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No. 85-

IN THE

Supreme Court of the United States

October Term, 1985

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Interstate Commerce Commission, when approving a transaction pursuant to 49 U.S.C. §§11343 and 11344, is required to make specific findings of necessity pursuant to 49 U.S.C §11341(a) in order to exempt the carriers participating in the approved transaction from the requirements of the Railway Labor Act (45 U.S.C. §§151-160 (1982))?

LIST OF PARTIES

Brotherhood of Locomotive Engineers and United Transportation Union were petitioners in the case below in the District of Columbia Circuit Court of Appeals.

Interstate Commerce Commission and United States of America were respondents.

Missouri-Kansas-Texas Railroad Company, Denver & Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, and Union Pacific Railroad Company were intervenors in support of the Interstate Commerce Commission.

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Missouri-Kansas-Texas Railroad Company ("MKT") petitions for a writ of certiorari to review an opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit, entered May 3, 1985, as amended July 12, 1985. The court of appeals' judgment vacated two orders of the Interstate Commerce Commission ("ICC" or "Commission") which held that the Commission's approval in Finance Docket No. 30,000 of MKT's trackage rights application rendered the provisions of the Railway Labor Act inapplicable to MKT's decision to operate the trackage rights with its own crews.

I.
OPINION BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 761 F.2d 714 (1985). It appears in the Appendix at A1. The Commission's orders appear in the Appendix at A36 and A40.

II.
JURISDICTION

The judgment of the court of appeals was entered on May 3, 1985, and amended on July 12, 1985. On August 9, 1985, the court of ap-

peals entered orders denying petitions for rehearing and suggestions for rehearing *en banc*. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1982).

III.
STATUTES INVOLVED

The statutes involved in this proceeding are the Interstate Commerce Act (49 U.S.C. §§11341(a), 11343, 11344 and 11347) and the Railway Labor Act, (45 U.S.C. §§151-160). The pertinent provisions of these statutes are set forth in the Appendix at A55-A63.

IV.
STATEMENT OF THE CASE

This case presents a critical question of the Interstate Commerce Commission's authority under 49 U.S.C. §11341(a) to exempt carriers participating in transactions approved by it under 49 U.S.C. §§11343 and 11344 from other laws, and, as pertinent here, the Railway Labor Act (45 U.S.C. §156). Although it is undisputed that ICC has authority to grant exemptions "as necessary" to let carriers implement approved transactions, a split panel of the District of Columbia Circuit Court of Appeals in this case has ruled that the exemption may be granted *only if* the law in question poses an obstacle to implementation of the transaction, and *only if* ICC makes specific findings of necessity under 49 U.S.C. §11341 justifying the exemption. The court of appeals' decision misapplies decisions of this Court, is inconsistent with ICC's longstanding interpretation of the Interstate Commerce Act, and directly conflicts with decisions of the Sixth and Eighth Circuit Courts of Appeal. The importance of this question of statutory interpretation in this case cannot be overstated. Thousands of shippers face a potential disruption of rail service unless this Court reviews the court of appeals' decision.

On September 15, 1980, Union Pacific Corporation filed an application before the ICC in Finance Docket No. 30,000 seeking ICC approval, *inter alia*, of the consolidation of Union Pacific Railroad Company ("UP") and Missouri Pacific Railroad Company ("MP") pursuant to 49 U.S.C. §§11343 and 11344. On the same date, Union Pacific Corporation and Western Pacific Railroad Company ("WP") filed a similar application. Petitioner Missouri-Kansas-Texas Railroad Company, a railroad operating principally in the states of Kansas, Missouri, Oklahoma, and Texas, opposed the consolidation,

alleging that it would suffer revenue diversions of approximately $23.8 million if the UP-MP-WP merger were approved. It contended that this loss of revenue would impair its ability to provide essential rail service on shipments moving between the Midwest and the Gulf Coast via Kansas City. 366 I.C.C. at 469.[1]

As part of its opposition case, and in an effort to minimize the anticompetitive effects of the UP-MP-WP merger in this market, MKT in January, 1981 filed an application seeking trackage rights over certain MP and UP lines, including the Kansas City-Omaha trackage rights here in issue. MKT proposed to conduct this trackage rights operation *with its own employees.* Proposed Agreement, Sec. 5, MKT Trackage Rights Application, F.D. 30,000 (Sub-No. 25). MKT filed evidence in support of its trackage rights application on February 20, 1981, and ICC held hearings on the application. Both Brotherhood of Locomotive Engineers ("BLE") and United Transportation Union ("UTU") were parties to the UP-MP-WP merger proceeding. Both BLE and UTU submitted evidence relating to MKT's trackage rights proposal. At no time during the evidentiary proceeding did BLE or UTU challenge MKT's right to use its own crews in its proposed trackage rights application or contend that the use of MKT's own crews would violate the Railway Labor Act.

On October 20, 1982, ICC served its decision in the UP-MP-WP merger case. In that order, the Commission observed that its review of the proposed consolidation was governed by 49 U.S.C. §11344, and noted that it was required to approve the transaction if it found the transaction to be "consistent with the public interest." 366 I.C.C. at 483. The interest of carrier employees affected by the proposed transaction was one of the mandatory factors that the Commission was required to consider in making its "public interest" determination. 49 U.S.C. §11344(b)(1)(D). In addition, under 49 U.S.C. §11347, the Commission was required to provide protective conditions for employees affected by the transaction. 366 I.C.C. at 618-619.

In its decision, ICC found that unconditional approval of the UP-MP-WP consolidation would not be in the public interest because,

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[1]The procedural history of these consolidated proceedings is set forth in *Union Pacific Corp., Pacific Rail System, Inc. and Union Pacific R.R.—Control—Missouri Pacific Corp. and Missouri Pacific R.R.*, 366 I.C.C. 459, 471-72, 479, 482 (1982).

inter alia, MKT would suffer an impairment of its ability to provide essential rail service on grain shipments moving from Omaha and other grain gathering points in the Midwest via Kansas City to Gulf Coast points. 366 I.C.C. at 530-531, 547. ICC concluded that those anticompetitive consequences could be "ameliorated" (366 I.C.C. at 531) and in some respects "fully off-set" (366 I.C.C. at 547) by conditioning its approval of the transaction upon the grant of certain of MKT's trackage rights requests.[2] In defining the nature of these conditions, the Commission specifically addressed the crew manning issue in analyzing MKT's trackage rights application. ICC commented on MP's challenge to MKT's estimate of the number of MKT employees required to provide the proposed service. 366 I.C.C. at 566-572. It agreed that MKT most likely had underestimated its crew requirements, but still found that MKT's proposed operation would be entirely feasible with an increased MKT crew complement. 366 I.C.C. at 569. It then approved MKT's trackage rights application *as filed* and imposed protective conditions for the benefit of employees affected by MKT's trackage rights operation. 366 I.C.C. at 621.[3]

UTU (and a number of other labor unions) appealed the Commission's decision approving the UP-MP-WP consolidation, arguing that the level of employee protection imposed on the primary transaction was insufficient to satisfy the provisions of 49 U.S.C. §§11344(b)(1)(D) and 11347. BLE did not appeal the ICC's October 20, 1982 decision. Neither UTU nor any other union claimed on appeal that approval of MKT's trackage rights application allowing MKT to use its own crews violated the Railway Labor Act (or any other statute). The District of Columbia Circuit Court of Appeals rejected the unions' arguments assailing the level of employee protection imposed by the ICC and affirmed this aspect of the Commission's decision. *Southern Pacific Transp. Co. v. ICC*, 736 F.2d 708, 725 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S.Ct. 1172 (1985).

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[2]ICC also granted certain trackage rights requested by Denver & Rio Grande Western Railroad Company. 366 I.C.C. at 572-578.

[3]Those conditions for employees affected by MKT's trackage rights application were as specified in *Norfolk and W. Ry. Co.—Trackage Rights—BN*, *354 I.C.C. 605 (1978)*, as modified in *Mendocino Coast Ry. Inc.—Lease and Operate*, 360 I.C.C. 653, 664 (1980). *See Union Pacific Corp., Pacific Rail System, Inc. and Union Pacific R.R.—Control—Missouri Pacific Corp. and Missouri Pacific R.R.*, supra, at 621.

Both prior to and subsequent to the Commission's October 20, 1982 order, MKT held discussions with BLE and UTU concerning the necessity to commence the trackage rights operations as soon as possible after approval was granted. In November, 1982, MKT exchanged proposals with BLE and UTU concerning the manning of the trackage rights operations. (J.A. at 27). MKT negotiated amendments to its collective bargaining agreements with BLE on January 5, 1983 to govern the trackage rights operation. On January 6, 1983, MKT commenced operations as a trackage rights tenant over the involved MP and UP lines using its own crews. *(Id.)*. On February 3, 1982, several weeks after the time for seeking judicial review had run, the International President of UTU expressly confirmed that Commission approval of MKT's trackage rights application gave MKT full authority to utilize its own crews. (MKT Motion to Dismiss, dated February 28, 1984, App. A and B). On March 10, 1983, MKT and MP filed a formal trackage rights agreement with ICC. (J.A. at x, No. 15). MKT reached formal agreements with UTU concerning the trackage rights operation on April 11 and April 13, 1983. (J.A. at 27).

Soon after MKT commenced its trackage rights operations, UTU, on behalf of MP employees, demanded of MP that *MKT* use MP crews to conduct *MKT's* trackage rights operations. MP did not accede to this demand, because ICC had specifically authorized MKT to use its own crews. As stated in UTU's brief to the court below, "petitioner UTU responded to MoPac's refusal to negotiate by declaring a strike of MoPac for April 4, 1983." (UTU Brief, p. 13). On March 30, 1983, MP filed a complaint in the Eastern District of Missouri seeking declaratory and injunctive relief against the strike. On that same date, the district court entered a temporary restraining order prohibiting, *inter alia*, implementation of UTU's strike threat. The district court preliminarily enjoined the strike on February 7, 1984, and issued a permanent injunction soon thereafter. *Missouri Pacific R.R. v. United Transp. Union*, 580 F. Supp. 1490 (E.D. Mo.), *appeal docketed*, No. 84-1465 (8th Cir. 1984).

On April 4, 1983, shortly after the district court issued a temporary restraining order prohibiting UTU's threatened strike, BLE filed with ICC a "Petition For Clarification" of the Commission's October 20, 1982 order, issued almost six months earlier. BLE cited "[r]ecent communications" from MP to the effect that MKT (and DRGW) were relying on the Commission's order in Sub-No. 25 (and

Sub-No. 18) as authority for the use of its own crews in performing the trackage rights operating in question. BLE argued that the Commission's October, 1982 order did not address the crew issue (J.A. at 2).

The Commission denied BLE's petition in an order served on May 18, 1983. In that decision, the Commission concluded as follows:

> The consolidation decision does not require clarification. We approved the responsive trackage rights applications of DRGW and MKT in Sub-No. 18 and Sub-No. 25 subject only to applicable employee protective conditions and the requirement that the parties negotiate compensation for use of the MP lines (or request us to set compensation in the event of an impasse). Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations. . .
>
> BLE has presented no arguments or evidence setting forth any issue in need of clarification. Rather, BLE is attempting to re-argue an issue that has already been decided.

(A38).

Thereafter, on May 31, 1983, BLE filed with ICC a "Petition for Reconsideration" of the May 18 order. BLE contended that the Commission exceeded its jurisdiction in its October 20, 1982 order when it authorized MKT to use its own crews. BLE's conclusion and prayer for relief provided:

> In sum, the Brotherhood of Locomotive Engineers submits that the Commission does not have jurisdiction over these labor disputes since such matters are within the purview of the Railway Labor Act, and respectfully requests that the Commission grant this petition for reconsideration and issue an order holding that crew assignments and manning of positions are matters not within the jurisdiction of the Commission but are labor disputes to be resolved under the procedures of the Railway Labor Act.

(J.A. at 54).

On June 7, 1983, UTU also petitioned ICC for reconsideration of its May 18, 1983 order. UTU allegedly had presumed that the *Mendocino* conditions[4] would provide *MP* employees with an opportunity to participate in *MKT's* decision to assign crews for the trackage rights operation. (UTU Reply to MKT Motion to Dismiss at 14). UTU argued that:

> This Commission does not have the authority under 49 U.S.C. §11341 to grant an exemption from the unilateral change prescriptions of the Railway Labor Act, and even if it did, it has not done so in this case.

(J.A. at 77).

The Commission entered an order on October 25, 1983, denying BLE's and UTU's petitions for reconsideration (A40). In that decision, ICC held that it had jurisdiction under 49 U.S.C. §11341(a) to exempt a transaction approved under 49 U.S.C. §§11343 and 11344 from the provisions of the Railway Labor Act (A45 U.S.C. §156). In addition, it rejected UTU's argument that specific supporting findings of necessity were required to exempt the crewing issue from any other laws, since it had made detailed findings of the public interest requirements in approving MKT's trackage rights application, and since the identity of the crews was a material term of the approved transaction. In light of these facts, the Commission found that Section 11341 immunity was self-executing on the crew issue (A44-48).

In December, 1983, BLE and UTU filed with the District of Columbia Circuit petitions for review of the ICC's May 18, 1983 and October 25, 1983 orders. The unions claimed in the case below that, *inter alia*, ICC exceeded its authority by exempting MKT's decision to use its own crews in the trackage rights operation from the requirements of the Railway Labor Act.[5]

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[4]*See supra* note 3.

[5]The unions also argued that this action violated the *Mendicino* conditions imposed pursuant to 49 U.S.C. §11347, (*see supra* note 3), but the majority found it unnecessary to reach this issue in light of its view that the Commission failed to justify an exemption from the requirements of the Railway Labor Act (A13).

In a 2-1 decision, the District of Columbia Circuit vacated the ICC's May 18, 1985 and October 25, 1985 decisions. Judges Wright and Mikva found that ICC did not show a necessity for waiving the Railway Labor Act in the exercise of its Interstate Commerce Act authority.[6] (A13). The majority held that "the Commission must supply some basis for a necessity determination before the exemption authority applies," and relied upon a line of Supreme Court cases that supposedly hold that "ICC may waive . . . laws only if these . . . laws pose an obstacle to the transaction." (A14).[7] The majority rejected ICC's holding in the October 25, 1983 order that "the terms of Section 11341 immunizing an approved transaction from any other laws are self-executing," and stated that "to the extent that [the Eighth Circuit's decision in *Brotherhood of Locomotive Eng'rs. v. Chicago & N.W. Ry. Co.*[8]] may be read to say that ICC need supply no *basis* for the necessity determination, we find the interpretation ill-conceived and reject it" (A16, n.6). The majority then remanded the case to the Commission with instructions that "the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction" (A17).

Judge MacKinnon filed a vigorous dissent to the majority opinion. He correctly noted that "the whole basis for granting the trackage rights, which included the crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger" (A24). He observed that 49 U.S.C. §11341(a) grants ICC very broad exemption powers and cited *Brotherhood of Locomotive Eng'rs. v. Chicago & N.W. Ry.*, 314 F. 2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), to support his and the

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[6]The majority also rejected the arguments of respondents and intervenors that BLE and UTU's appeals were untimely since they were aggrieved by the October 20, 1982 decision of the ICC and failed to file their petitions for review within the statutorily prescribed 60-day period, as required by 28 U.S.C. §2344 (1982) (A9-12).

[7]*See Callaway v. Benton*, 336 U.S. 132 (1949), *Seaboard Air Line R.R. Co. v. Daniel*, 333 U.S. 118 (1948), *Texas v. United States*, 292 U.S. 522 (1934), and *Schwabacher v. United States*, 334 U.S. 182 (1948).

[8]*Brotherhood of Locomotive Eng'rs. v. Chicago & N.W. R.R. Co.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

Commision's view that the terms of that paragraph are "self-executing" (A25-26). Judge MacKinnon discussed all of the Supreme Court cases relied upon by the majority to support its "obstacle" standard of exemption. His conclusion was that

> not only did the Supreme Court *not* adopt the rigorous 'obstacle' standard which the majority today requires, the Court envisioned that the legislative purpose was to grant the Commission *greater* authority than the majority suggests to override state laws where needed to approve transactions 'consistent with *the public interest*' and to ensure that they are 'just and reasonable.' *Schwabacher*, 334 U.S. at 94-95.

(A32).

Judge MacKinnon agreed with the majority's obvious assertion that "the ICC cannot bootstrap any exemption to its approval of transactions without justification," but he correctly pointed out that "this is far from such a case, since the necessity for waiver is clear" (*Id.*) He then stated,

> The whole point of granting the trackage rights applications was to reduce the anti-competitive effects of the consolidation (J.A. 169). Under the ICC's decision the Katy and the Rio Grande will be handling traffic for their own accounts, not for the consolidated UP-Missouri Pacific-Western Pacific (*Id.*). Thus, the trackage rights operations were meant to be conducted *in competition with* the merged UP-Missouri Pacific-Western Pacific operations, *id.*, and to offset to some extent the monopolistic effects of that enormous consolidation. The majority opinion gives short shrift to these essential reasons for the ICC's decision. To be sure, the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*. It is no surprise the Commission did not feel compelled to spell out specifically such a proposition.

(A32-33).

Both ICC and MKT filed petitions for rehearing and suggestions for rehearing *en banc*. Those petitions were denied by the District of Columbia Circuit in orders dated August 9, 1985.[9]

V.
REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS' INTERPRETATION OF 49 U.S.C. §11341(a) IS AT ODDS WITH THE LEGISLATIVE HISTORY AND UNAMBIGUOUS LANGUAGE OF THE STATUTE AND IS IRRECONCILABLE WITH THE DECISION OF THIS COURT IN *SCHWABACHER V. UNITED STATES*.

Section 11341(a) contains unmistakable language conferring broad authority upon ICC. It provides that the Commission's authority to approve transactions such as rail mergers is "exclusive" and exempts carriers, corporations, or persons participating in approved transactions "from the antitrust laws and from all other law, including state and municipal law as necessary to let that person carry out the transaction [and] hold, maintain or operate property. . . ." 49 U.S.C. §11341(a) (1982). By requiring ICC to make express findings to justify the necessity of every waiver before invoking its exemption authority under Section 11341(a), *in addition to* the findings mandated by 49 U.S.C. §11344, the majority, in Judge MacKinnon's words, "has made the ICC's Section 11341(a) exemption authority completely disappear," and has created a new step in the consolidation procedures required by the Act which will hinder rather than facilitate Congressional transportation policy.

Section 11341 was formerly Section 5(11) of the Interstate Commerce Act,[10] and was enacted into law as part of the Transportation

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[9]Circuit Judge MacKinnon voted to grant the petition for rehearing, and Circuit Judge Starr voted to grant the suggestion for rehearing *en banc* (A53-54).

[10]The Interstate Commerce Act was recodified in 1978 without substantive change. Interstate Commerce Act, Pub. L. No. 95-473, 1978 U.S. Code Cong. & Ad. News (92 Stat. 1337).

Act of 1940, 54 Stat. 908. On several occasions, this Court has examined the legislative history of that statute *(see, e.g., St. Joe Paper Co. v. Atlantic Coast Line R.R. Co.*, 347 U.S. 298, 315 (1954)), and has found that the congressional purpose in the sweeping revision in Section 5 of the Interstate Commerce Act in 1940 was "to *facilitate* merger and consolidation in the national transportation system" [emphasis supplied]. *County of Marin v. United States*, 356 U.S. 412 (1958). This Court also has observed that the enactment of Section 5(11) of the Transportation Act of 1940 constitutes "additional proof" of Congress' purpose to grant adequate power to the Commission to override laws which *may* interfere with efficient and economical railroad operation. *Seaboard Air Line R.R. Co. v. Daniel*, 333 U.S. 118 (1948).

The interrelationship of the exemption provisions of Section 5(11) and the merger approval provisions of Section 5(2) of the Interstate Commerce Act was addressed by the Court in *Schwabacher v. United States*, 344 U.S. 182 (1948). In that case, the Court held that

> approval of a voluntary railroad merger is dependent upon three, and upon *only* three, considerations: First, a finding that "it will be consistent with the public interest" (§5(2)(b)). Second, a finding that, subject to any modification made by the Commission, it is "just and reasonable" (§5(2)(b)). Third, assent of a "majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote" (§5(11)). [Emphasis added].

(Id. at 194*)*.

The Court then stated that,

> When these conditions have been compiled with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions.

(Id.).

Thus, *Schwabacher* stands for the proposition that if the Commission makes the findings required by 49 U.S. §11344, as it undeniably did in this case, the exemption provisions of §11341(a) *automatically* apply to enable the carriers to effect the transaction.

The majority virtually ignored *Schwabacher* in its analysis of this Court's decisions. Instead, it relied on three decisions of this Court —*Callaway v. Benton*, *Seaboard Air Line R.R. Co. v. Daniel*, *and Texas v. United States* which assertedly supported its view that ICC only may waive laws that pose "obstacles" to transactions before it.

Judge MacKinnon ably highlighted the majority's erroneous reasoning. He noted that *Callaway* arose under Section 77 of the Bankruptcy Act (formerly 11 U.S.C. §205) rather than under the merger provisions of the Interstate Commerce Act, and " in its only comment relevant to this case," the Court indicated merely that nothing in its opinion should be read to derogate its prior opinions upholding the ICC's power to *override* state laws interposing obstacles in the path of otherwise lawful plans of reorganization. (A28). Similarly, *Seaboard* failed to support the majority's opinion. As stated above, the Court in that case acknowledged ICC's power to override laws that *may* interfere with approved transactions. That language alone vitiates the "obstacle" standard created by the majority in the case below.

Finally, *Texas v. United States* is also misinterpreted by the majority. As Judge MacKinnon correctly observed, the Court in that case emphasized that one purpose of the immunity provision was to promote economy and efficiency by removing burdens created by state laws. (A30). This reasoning is far removed from the majority's holding that a statute *must* create an obstacle to a transaction before an exemption may be granted.

By holding that ICC may exempt carriers only from laws that pose obstacles to a successful implementation of approved transactions, and holding that separate findings of "necessity" are required under 49 U.S.C. §11341 before an exemption may be granted, the court of appeals has ignored the clear meaning of the language of 49 U.S.C. §11341 and has rendered a decision that is irreconcilable with the *Schwabacher* decision of the Court.

B. THE JUDGMENT BELOW CONFLICTS WITH DECISIONS OF THE SIXTH AND EIGHTH CIRCUIT COURTS OF APPEAL AND CREATES A SPLIT OF AUTHORITY THAT CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

In its October 25, 1983 decision, the Commission relied on the decision of the Eighth Circuit in *Brotherhood of Locomotive Eng'rs. v. Chicago and N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied* 375 U.S. 819 (1963) to support its view that, once it made appropriate findings on the public interest aspects of a transaction under 49 U.S.C. §11344, the exemption provisions of §11341(a) are "self-executing." (A44). The District of Columbia Circuit's interpretation of the Commission's authority under 49 U.S.C. §11341(a) to exempt carriers from the requirements of the Railway Labor Act directly conflicts with *BLE* and decisions of other circuits as well.

In *BLE*, the Eighth Circuit characterized the basic issue presented as "whether the statutory authority conferred upon the ICC by the Interstate Commerce Act to approve and facilitate mergers of carriers includes the power to authorize changes in working conditions necessary to effectuate such mergers."[11] It examined the legislative history of former Section 5(2)(f) of the Interstate Commerce Act, (now 49 U.S.C. §11347) and it noted that Congress rejected an amendment to the Transportation Act of 1940 proposed by Representative Harrington which, if adopted, would have frozen existing employees in their job rights. The Eighth Circuit reasoned that

> the ICC['s] power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist... [U]nder the Railway Labor Act provisions, it is possible for either party

[11]Significantly, the majority in the case below suggest that MKT's trackage rights operation would create a unilateral change in the working conditions of MP employees, which would violate the Railway Labor Act [45 U.S.C. §156 (1982)]. (A7-16). As both the dissent and the Commission emphasized, no factual support whatsoever existed for that assertion, since the unions failed to introduce *any* evidence to establish the existing collective bargaining rights and actual working conditions of MP employees. (A24, A47).

> to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations.

(*Id.* at 430-431).

As in this case, the Eighth Circuit was faced in *BLE* with an argument by the unions that the Commission made no "express finding" that the Railway Labor Act necessarily conflicted with the Commission's approval under the Interstate Commerce Act. *Id.* at 432. It then agreed with the Commission's interpretation of §5(11), as set forth in *Chicago St. P. M. & O. Ry. Lease*, 295 I.C.C. 696 (1958):

> We find nothing in that paragraph [§5(11)] or in other portions of Section 5, which authorizes us to determine and declare the particular laws within the scope of paragraph (11) from which a carrier shall be relieved. The terms of this paragraph are self- executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. *It is sufficient if we make clear what the carrier is authorized to do.* [Emphasis added.]

(*Id.* at 432).

The Eighth Circuit then noted that

> the Commission did actually approve the proposed merger and the included agreement for the protection of railroad employees as it was authorized to do. Such approval, in absence of language manifesting a contrary intent, carried with it any exemption from the restraints of other laws as contemplated by §5(11) to the extent necessary to carry out the merger.

(*Id.*).

The Eighth Circuit's interpretation of §5(11) was followed by the Sixth Circuit in *Nemitz v. Norfolk and W. Ry.*, 436 F.2d 841 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971). In that case, arising out of another rail merger, the court of appeals was faced with a claim that the procedures of the Railway Labor Act rather than the employee

protective conditions imposed by the Commission were applicable to resolve a labor dispute. The Sixth Circuit rejected the Railway Labor Act argument, holding that

> there must be exclusive and plenary authority in the I.C.C. to achieve the purposes of the Act. The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if authority to adjust work alignments through fair compensation did not exist. Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied.

(*Id.* at 845).

The judgment below directly conflicts with the decisions of Sixth Circuit in *Nemitz* and the Eighth Circuit in *BLE*. This Court should resolve the conflict by adopting the Eighth Circuit's interpretation of the statute.[12]

C. THE JUDGMENT BELOW OVERRULES WITHOUT JUSTIFICATION A LONG-STANDING INTERPRETATION OF THE INTERSTATE COMMERCE ACT BY THE INTERSTATE COMMERCE COMMISSION

This Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 104 S.Ct. 2778 (1984), summarized the proper standard

[12]The majority also relies on two decisions of the Fifth Circuit Court of Appeals to support its interpretation of 49 U.S.C. §11341. *See City of Palestine, Tex. v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978), and *Texas & N. O. R.R. Co. v. Brotherhood R.R. Trainmen*, 307, 5.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 1952 (1963). (A15). However, unlike the present case, the Fifth Circuit in those two cases was not faced with a determination by ICC that the requested exemption related to a material term of the approved transaction. (*See* A50). Those cases merely stood for the obvious proposition that ICC may not exempt carriers from requirements of other laws unless the exemptions are necessary to enable the carriers to carry out the approved transactions.

of review of an agency's interpretation of its governing statute:

> When a court reviews an agency's construction of the Statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, *the court does not simply impose its own construction on the statute*, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [Emphasis added.]

(*Id.* at 2781-2782 footnote omitted).

The Court also emphasized in *Chevron* that considerable weight should be accorded to the agency's construction of the statutory scheme it is entrusted to administer. (*Id.*at 2782).

The Court below simply ignored the guidance provided by *Chevron*. It erroneously reinterpreted Section 11341(a) without finding that the statutory language involved was ambiguous. It also failed to accord ICC its deserved deference in interpreting its governing statute. As Judge MacKinnon correctly put it, "in doing so, the panel has usurped the statutory authority of the ICC and has substituted its own judgment for that of the ICC." (A35).

The Commission's interpretation of 49 U.S.C. §11341(a), (as set forth in the *BLE* decision at page 14, *supra*), consistently has been followed for over twenty-five years. *See, e.g. Texas Turnpike Auth.-Abandonment-St. L. S.W. Ry. Co. of Tex.*, 328 I.C.C. 42, 46 (1965) *Ex Parte No. 260, Revised Regulations Governing Officers*, 336 I.C.C. 679, 682 (1970); *Railway Express Agency, Inc., Notes*, 348 I.C.C. 157, 215 (1975). That interpretation is consistent with the interpretation of the statute rendered by this Court and with the legislative history. It is inconceivable that the majority's interpretation rather than ICC's interpretation is correct, where the result of the majority's decision

could require MKT to bargain with MP's employees and face potential disruptions of service in its efforts to perform rail service required by the public interest. (A34).

VI.
CONCLUSION

For the foregoing reasons, Missouri-Kansas-Texas Railroad Company respectfully requests the Court to grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, Respondents.

Missouri-Kansas-Texas Railroad Company, Denver & Rio Grande Western Railroad Company, Union Pacific Railroad Company, et al., Intervenors.

UNITED TRANSPORTATION UNION, Petitioner,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Respondents.

Missouri-Kansas-Texas Railroad Company, Denver & Rio Grande Western Railroad Company, Union Pacific Railroad Company, et al., Intervenors.

Nos. 83-2290, 83-2317.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 4, 1984.

Decided May 3, 1985.

As Amended July 12, 1985.

Vacated and remanded.

MacKinnon, Senior Circuit Judge, filed a dissenting opinion.

Petitions for Review of Orders of the Interstate Commerce Commission.

Harold A. Ross, Washington, D.C., with whom Gordon P. MacDougall, Washington, D.C., was on the brief, for petitioner in No. 83-2290.

John O'B. Clarke, Jr., Washington, D.C., for petitioner in No. 83-2317.

Sidney L. Strickland, Jr., Atty., I.C.C., Washington, D.C., with whom Robert S. Burk, Acting Gen. Counsel, and Henri F. Rush, Associate Gen. Counsel, I.C.C., J. Paul McGrath, Asst. Atty. Gen., and John J. Powers, III and Frederic Freilicher, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents.

John H. Caldwell and Denise M. O'Brien, Washington, D.C., and Kendall T. Sanford, Denver, Colo., were on the brief for intervenor Denver & Rio Grande Western R. Co.

James M. Verner, Ronald B. Natalie and Joseph L. Manson, III, Washington, D.C., and Michael E. Roper, Dallas, Tex., were on the brief for intervenor Missouri-Kansas-Texas R. Co. William C. Evans, Washington, D.C., entered an appearance for that intervenor.

James V. Dolan, Charles A. Miller, and Gregg H. Levy, Washington, D.C., and Nina K. Wuestling, St. Louis, Mo., were on the brief for intervenors Union Pacific R. Co. and Missouri Pacific R. Co.

Before WRIGHT and MIKVA, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the court filed by Circuit Judge WRIGHT.

Dissenting opinion filed by Senior Circuit Judge MacKINNON.

J. SKELLY WRIGHT, Circuit Judge:

Two unions—the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU)—object to the Interstate Commerce Commission's interpretation of labor issues arising from ICC's approval of a railroad consolidation.

The unions claim that, when the dust settled from the consolidation, certain railroads had effectively squeezed them out of their previous role in determining the crews used on particular routes. At the time, in early 1983, the unions objected and argued that the rail-

roads' actions violated statutory labor protections. Since the railroads responded that ICC had given the full crew selection rights in the consolidation approval, the unions appealed to ICC for an order clarifying that its general consolidation approval did not affect previous labor arrangements, including crew selection rights.

In two decisions ICC rejected the unions' arguments. It maintained that the railroads' intentions on crew selection had been clear in the consolidation as approved and that ICC's authority to exempt transactions from legal obstacles, 49 U.S.C. §11341(a) (1982), immunized these crew selection prerogatives from later attack.

The unions now petition this court to vacate those ICC decisions. Four railroads—the Denver & Rio Grande Western (D&RGW), the Missouri-Kansas-Texas (MKT), the Missouri Pacific (MP), and the Union Pacific (UP)—are intervening in support of the Commission.

Because we find that ICC made no semblance of a showing that the exemption was necessary, as required by the exemption authority section, we vacate the ICC decisions and remand the case to the Commission for proceedings consistent with this opinion.

I. BACKGROUND

A. Legal Framework

This case presents the intersection of two statutory mandates—ICC's exclusive authority to approve rail consolidations under the Interstate Commerce Act and the statutory protection for rail labor employees under both the Railway Labor Act and the Interstate Commerce Act. The unions argue that (1) ICC did not show a necessity for waiving the Railway Labor Act in the exercise of its Interstate Commerce Act approval authority, and (2) ICC *cannot* waive the Interstate Commerce Act's labor protection conditions in the exercise of that approval authority. Ultimately, we find the Railway Labor Act argument dispositive, and we vacate the ICC decisions on that basis. To fully understand the texture of this dispute, however, it is necessary to examine the Interstate Commerce Act labor protection conditions as well.

1. *ICC's approval authority.* Under the Interstate Commerce Act, ICC has exclusive authority to approve certain consolidations and mergers. 49 U.S.C. §11341 *et seq.* (1982). The Act enumerates the types of transactions to which ICC's approval authority applies, *id.* §11343,

and the considerations that must guide ICC. *id.* 11344. Most significantly for this appeal, "[a] carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." *Id.* §11341(a). Thus ICC has the power to approve a transaction and exempt its participants from legal obstacles that would impede its fruition.

In the exercise of this authority to exempt consolidations from the constraints of applicable statutes, ICC has certain ultimate constraints on its broad authority. First, there is a necessity component to the plenary authority: the statute specifies that ICC may exempt transactions from applicable laws *"as necessary"* for completion of the transaction. Second, as with any agency action, ICC's exercise of its authority must comport with the requirements of reasoned decisionmaking. *See generally United States v. ICC*, 396 U.S. 491, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970).

2. *Labor protection requirements.* Statutory protections for railroad employees have received considerable congressional attention. Two important statutory vehicles for the current labor protection requirements are the Railway Labor Act, 45 U.S.C. §151 *et seq.* (1982), and the Interstate Commerce Act's labor protection section, 49 U.S.C. §11347.

The Railway Labor Act creates a highly structured system for administering and resolving labor disputes. In passing the Railway Labor Act Congress sought, in part, "[t]o avoid any interruption to commerce * * *, to forbid any limitation upon freedom of association among employees * * *, [and] to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions[.]" 45 U.S.C. §151a. The statute specifies eleven general duties of rail carriers, *id.* §152. It also creates a variety of mechanisms to settle rail labor disputes—a National Railroad Adjustment Board, *id.* §152, a National Mediation Board, *id.* §§154-155, and a system of arbitration, *id.* §§157-159. The statute gives special attention to changes in rates of pay, rules, and working conditions. It provides that employers give employees the opportunity for negotiation and mediation before implementing such changes. *Id.* §156; *see also*

id. §152, Seventh duty. The Railway Labor Act thus stands as an important structure for maintaining labor peace and fairness.

The Interstate Commerce Act labor protection section, 49 U.S.C. §11347, affords employees substantial protection from the effects of mergers and consolidations. Such labor protection conditions have a long history. See *New York Dock Railway v. ICC*, 609 F.2d 83,86-90 (2d Cir. 1979). In its current version the section provides that, in the exercise of its approval authority, "the Interstate Commerce Commission *shall require* the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976 * * *." 49 U.S.C. §11347 (emphasis added).

ICC has specified the particular conditions that must be observed for this Section 11347 requirement. The conditions for protecting labor in a *merger* are known as *New York Dock* conditions, *see New York Dock Railway*, 360 ICC 60 (1979), *aff'd sub nom. New York Dock Railway v. ICC, supra.* The conditions for protecting labor in *transfers of trackage rights* are known as *Norfolk & Western* conditions, *see Norfolk & Western Railway Co.*, 354 ICC 605 (1978), *modified by Mendocino Coast Railway, Inc.*, 360 ICC 653, 664 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir.1982). These conditions include negotiation and mediation for dismissal and displacement of employees, 354 ICC at 610-611, 360 ICC at 85; dismissal and displacement compensation, 354 ICC at 611-612, 360 ICC at 86; and a system of arbitration, 354 ICC at 613, 360 ICC at 87-88. Generally, the conditions provide that "[t]he rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits * * * of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statues." 354 ICC at 610, 360 ICC at 84. ICC has thus established conditions for discharging its statutory responsibility to protect labor benefits in the midst of consolidations.

In short, ICC has authority to approve certain transactions, even to the extent of exempting the transactions from other laws. At the same time, the Railway Labor Act structures rail labor relations, and

the Interstate Commerce Act's labor protection section gives rail employees a measure of protection from the effects of rail transactions.

B. The Current Dispute

This dispute has three important stages: (1) ICC's consolidation approval in 1982; (2) the post-approval conflict over crew selection; and (3) the two ICC decisions in 1983.

1. *ICC approval for the consolidation.* In 1982 UP and MP applied to ICC for approval of a consolidation under ICC's exclusive authority.[1] Several railroads and several unions (including the petitioners) objected to the proposed consolidation. On October 20, 1982 ICC approved the consolidation, but it also approved the application of two railroads for "trackage rights"[2] over specified MP routes to ameliorate possible anticompetitive effects. D&RGW received trackage rights for one route (Pueblo, Colorado to Kansas City, Missouri), and MKT received trackage rights for several other routes. *See Union Pacific-Control-Missouri Pacific*, 366 ICC 459 (1982), *affirmed in part and remanded in part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir.1984) *(per curiam)*, *cert. denied*, — U.S. —, 105 S.Ct. 1172, 84 L.Ed.2d 322 (1985). These are the four railroads who are intervening in support of the ICC decisions—the two who received ICC approval of their consolidation (UP and MP) and the two who received trackage rights for MP routes as conditions of that approval (D&RGW and MKT).

In their applications for trackage rights D&RGW and MKT both commented on crew selection. D&RGW specified that it could, at its option, use its own crews when it used the newly granted trackage rights, Finance Docket No. 30,000 (Sub-No. 18) (DRGW-8) *(cited in* ICC Decision of October 25, 1983, Joint Appendix (JA) 164); MKT specified that it *would* use its own crews, Finance Docket No.

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[1]Western Pacific Railroad Company was also involved in the consolidation, but its role is not relevant to these petitions.

[2]"Trackage rights" give one railroad the right to run its trains over another railroad's tracks. Indisputably, trackage rights are "'subject to ** specific negotiations,'" dissent at 734. They are also subject to governing statutes and to the conditions of the Commission's approval, including the imposition of general labor protection conditions.

30,000 (Sub-No. 25) (MKT-25) *(cited in* ICC Decision of October 25, 1983, JA 164).

In granting the trackage rights ICC did not mention crew selection. The Commission primarily addressed the need for the trackage rights to prevent possible anticompetitive effects from the consolidation. 366 ICC at 566-568, 572-578. Indeed, the Commission denied part of MKT's application for trackage rights because it did not agree that these trackage rights were needed to promote competition. *Id.* at 570-572. Notably, ICC emphasized that its general trackage rights approval was subject to the *Norfolk & Western* conditions that protect workers' rights in trackage rights situations. 366 ICC at 654; *id.* at 621-622. This statement was ICC's only reference to labor arrangements in the use of trackage rights.

2. *The crew assignment controversy.* After the consolidation became effective, the railroads began performing their approved trackage rights operations. D&RGW temporarily used MP crews on the MP routes, but claimed that it would soon use its own crews. Exhibit A to BLE's Petition for Clarification of ICC's October 20, 1982 decision, JA 6. MKT, meanwhile, began using its own crews. UTU's Petition for Reconsideration of ICC's denial of BLE's Petition for Clarification at 3, JA 74. The unions objected. They claimed that the unions representing MP employees had an established right to a role in crew assignment and that the railroads were changing that condition without consulting them. Both D&RGW and MKT, however, claimed that the ICC approval of their applications gave them a right to use their own crews and that ICC's exemption authority immunized this right from later legal challenge. MP's Reply to BLE's Petition for Clarification at 11, JA 24; UTU's Petition for Reconsideration at 3-4, JA 74-75.

D&RGW also made an additional argument. The Atchison, Topeka, & Santa Fe Railway Company had challenged D&RGW's temporary use of MP crews in the trackage rights as anticompetitive and impermissible. On November 24, 1982 and January 18, 1983, ICC issued decisions rejecting the challenge and upholding D&RGW's plans, including the preliminary decision to use existing MP crews. The Commission noted that D&RGW had the choice of using its own crews; the Commission did not mention any lurking labor relations issues. ICC Decision, November 24, 1982, at 3 (D&RGW brief, Ap-

pendix B); ICC Decision, January 18, 1983, at 3 (*id.*, Appendix C). In response to the unions' challenge, D&RGW claimed that these ICC decisions settled the validity of its crew selection plans. Reply of D&RGW to BLE's Petition for Clarification, JA 9-10.

Initially, the two unions responded to the railroads' position on crew selection in different ways. The United Transportation Union threatened to strike over the crew assignment issue. MP sought an injunction preventing the threatened strike. On March 1, 1984 the District Court for the Eastern District of Missouri issued such an injunction. *Missouri Pacific R. Co. v. United Transportation Union*, 580 F.Supp. 1490 (E.D.Mo.1984). An appeal from that injunction is pending.

The Brotherhood of Locomotive Engineers took a different tack. On April 4, 1983 it filed a petition with the Commission and requested clarification that the consolidation approval did not alter previous labor arrangements, particularly with respect to crew selection. BLE claimed that the normal Railway Labor Act and Interstate Commerce Act labor protection conditions (§11347) should apply. BLE's Petition for Clarification, JA 2-4. After ICC rejected BLE's interpretation in a May 18, 1983 decision, UTU joined BLE in a May 31 petition requesting reconsideration. On October 25, 1983 the Commission elaborated on its earlier decision and continued to reject the unions' contentions.

3. *The ICC decisions.* In its May 18 decision refusing BLE's request, ICC maintained that it had already decided the issue of crew selection. The Commission claimed that it had exempted the crew selection provisions, which it had not mentioned in its decision, from all legal obstacles because those provisions were in the trackage rights applications. "Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations. * * We have broad authority to impose conditions on consolidation and our jurisdiction in plenary. Therefore, we properly authorized performance of trackage rights tenants using their own crews." ICC Decision of May 18, 1983 at 4-5, JA 36-37. ICC did not specifically address the Railway Labor Act and Section 11347 arguments. Thus in its May decision ICC implied that it had immunized the crew selection prerogatives from legal obstacles by dint of having approved the trackage applications.

In its October decision the Commission again denied the unions' request. It rejected the notion that it had to provide some basis for concluding that waiver of the Railway Labor Act was necessary to the transaction. "The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints." ICC Decision of October 25, 1983 at 7, JA 163. The Commission similarly rejected the claim that Section 11347 rights were being violated. "To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transactions." *Id.* at 6, JA 162. The Commission thus continued to maintain that it had immunized the crew selection from all subsequent legal obstacles, and it continued to offer no analysis of the necessity of this immunity for completion of the transaction.

The unions filed petitions to this court. They claim that ICC exceeded its authority by unjustifiably waiving the Railway Labor Act and the Interstate Commerce Act labor protection conditions.

II. THRESHOLD ISSUES

Before reaching the statutory issues, we must consider two threshold issues: timeliness and issue preclusion.

A. *Timeliness*

ICC and the four intervening railroads argue that the unions are barred because their appeal is not timely. We disagree.

The timeliness dispute turns on the interpretation to be given various Commission actions. The jurisdictional statute permits judicial review if an appeal of a final order is filed within 60 days. 28 U.S.C. §2344 (1982). The railroads and ICC contend that ICC's final order on crew selection prerogatives issued on October 20, 1982 (the decision giving general approval for the UP/MP consolidation, subject to the grant of trackage rights to D&RGW and MKT). They argue that the unions' appeals for clarification in April 1983 (resulting in the May 1983 decision) and May 1983 (resulting in the October 1983

decision) are entitled to no weight because those ICC decisions were merely procedural refusals to reopen a matter decided in the October 1982 order.

The railroads and ICC rely heavily on *Nat'l Bank of Davis v. Office of Comptroller of Currency*, 725 F.2d 1390 (D.C. Cir.1984) *(per curiam)*. In that case the court ruled that a petition for review was not timely when petitioner took no action during the statutory time period of 30 days, asked the agency to reconsider two months after the decision, and sought to invoke the court's jurisdiction by filing a petition for judicial review within 30 days after the agency denied the petition for reconsideration. The railroads and ICC argue that, similarly, in the case on appeal, the unions seek to make their petition timely by dating the time period for judicial review only from the procedural refusal to reopen a previous proceeding.

[1] Their reliance on *Davis* is misplaced. As this court observed some time ago in *Investment Company Institute v. Board of Gov. of FRS*, 551 F.2d 1270, 1281-1282 (D.C.Cir.1977), and very recently in *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905, 912, 915 (D.C.Cir.1985) time limits on review may, in exceptional circumstances, be "excused" when an issue is not ripe for review during the statutory period. As we emphasized in *Eagle-Picher*, petitioners generally are obliged to seek judicial determination of the *ripeness* of their claims during the statutory period. "In general, we will refuse to hypothesize whether, in retrospect, a claim would have been deemed ripe for review had it been brought during the statutory period, in order to save an untimely claim." 759 F.2d at 909. However, we specifically noted that "[e]xceptions occasionally may be justified in the light of changed circumstances giving rise to a new cause of action beyond the statutory period for review; compelling case precedent that makes it clear beyond doubt that the claim was not ripe during the statutory period; or clear evidence that a failure to consider a petitioner's claims would work a manifest injustice." *Id.*

[2] The instant case clearly presents a situation in which the petitioners' claim ripened after the expiration of the statutory period due to changed circumstances resulting from a misleading statement of position by ICC. The petitioners had no notice of their present claim until after ICC denied their petition for clarification and reconsideration thereof. In its initial decision, the ICC specifically said that the

statutory labor protection conditions would apply and, thus, it would have been premature for the unions to have claimed that the conditions were being violated. The Commission and the railroads argue that the trackage applications specifically noted that D&RGW *might*, and MKT *would*, use their own crews, and thus there was no ripeness problem. However, those applications were bounded by ICC's general pronouncement that the labor protection conditions would not be violated. As soon as it became apparent that MKT intended to use its own crews, the unions petitioned ICC for clarification of the application of the labor protection conditions. The issue did not become ripe for judicial review until the Commission had specified that crew selection was exempt from all otherwise applicable legal requirements.[3]

[3,4]Nor can it be claimed that the petition should be barred because it was not filed within 60 days after the May decision. For the Commission then undertook extensive review and issued a lengthy opinion in October. If the motion for reconsideration is filed within the statutorily prescribed review period, the time limitation tolls until the agency issues its final decision on the motion for reconsideration, *see Outland v. CAB*, 284 F.2d 224 (D.C.Cir.1960); *Davis, supra*, 725 F.2d at 1391 n. 5, and it is tolled while the agency is giving full consideration to the issues presented for judicial review, see *Nat'l Insulation Transportation Committee v. ICC*, 683 F.2d 533, 543 n. 17 (D.C.Cir. 1982).

[5] The railroads and the Commission also claim that the petition should be barred as untimely because ICC clarified its policy on crew assignment in decisions issued on November 24, 1982 and January 18, 1983. At that time D&RGW had not exercised its option

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[3]The dissent's extended timeliness objection rests on a single, mistaken assumption: "Though these labor protections were held to be applicable in general, * * * they were to be inapplicable to the crew selection issue since the crew selection provisions constituted part of the trackage rights applications approved by the final order of the Commission." Dissent at 727. Unfortunately, not one word of ICC's October 1982 decision suggested that its unequivocal commitment to labor protection conditions was somehow "inapplicable to the crew selection issue." From all appearances, ICC's imposition of labor protection conditions qualified its approval of the crew selection applications, rather than the reverse. Therein lies the nub of this case and the reason why petitioners' claim was in fact, not ripe until ICC modified that earlier commitment in the proceedings at issue.

to use its own crews: the Atchison, Topeka & Santa Fe Railway was protesting its use of MP crews as anticompetitive. In its decisions ICC noted that D&RGW had the option of using its own crews. The argument that this statement should have put the unions on notice is unconvincing: nothing suggested that ICC had changed its view that the general labor protection conditions would apply in full force. The dispute is not over whether the railroads could use their own crews: it is whether they could use their own crews subject to the requirements of the labor protection conditions. Before May 1983 the Commission never suggested that D&RGW and MKT could use their own crews *without* observing the basic labor protection conditions. And before the railroads refused to negotiate in early 1983, the unions had no reason to appeal to the Commission for clarification. Thus the November 1982 and January 1983 decisions should not stand as a bar: although those decisions suggested that the railroads could use their own crews, ICC did not suggest that they could do so without observing the basic labor protection conditions.

Finally, pointing to the principle that parties should raise their objections in administrative proceedings, *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 73 S.Ct. 67, 97 L.Ed. 54 (1952), the railroads and ICC claim that the unions should have raised their objection in the October 1982 proceeding. However, in the administrative proceedings the unions did argue for vigorous labor protections, 366 ICC at 621-622. As discussed, it was not until the May decision that the unions should have realized that the labor protection conditions would not be fully applicable to crew selection.

B. *Issue Preclusion*

[6] MKT raises an additional threshold objection. It claims that the crew selection issues were decided in the opinion accompanying the Missouri District Court's injunction prohibiting UTU from striking, *see Missouri Pacific R. Co. v. United Transportation Union*, *supra*, 580 F. Supp. 1490, appeal pending, and that issue preclusion prevents this court from reaching the issues. This argument is frivolous. Despite broad dicta, the District Court recognized that it had no power to consider the validity of ICC orders. *See id.* at 1502 ("The United States Courts of Appeals are vested with exclusive jurisdiction to determine the validity of orders of the ICC."). Thus there can be no preclusive effects on this court's review of the validity of the ICC

order. *See 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §4420 (1981)* ("The fundamental rationale of issue preclusion dictates the clearly settled requirement that it be limited to matters that have been actually decided.").

We thus reject the threshold objections and turn to the merits of the unions' contentions.

III. STATUTORY ISSUES

The unions raise two statutory arguments: (1) ICC offered no inkling of a justification for the view that waiving the Railway Labor Act with respect to crew assignment was necessary to effectuate the transaction, and (2) the Interstate Commerce Act labor protection conditions (49 U.S.C. §11347) may not be waived because the labor protection section specifically qualifies ICC's consolidation approval authority (49 U.S.C. §11341). We find the first argument decisive.

The unions claim that ICC has wholly failed to justify the necessity for waiving the Railway Labor Act's applicability to the crew selection issue. The Commission claims that no such justification is necessary.

[7] Although an agency receives deference in interpreting its organic statute, the agency's authority is not unbounded. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, —- & n. 8, 104 S.Ct. 439, 444 & n. 8, 78 L.Ed.2d 195 (1983). In reviewing an agency's interpretation we must consider whether it is within the delegation to the agency envisioned by Congress. *State of Montana v. Clark*, 749 F.2d 740, 744-747 (D.C.Cir.1984). Our analysis must begin with the language of Congress. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, — U.S. —, —, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). [8] The statutory language dictates that the Commission's exemption authority applies only "as necessary" to allow transactions to occur. 49 U.S.C. §11341(a). Congress has given ICC broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component. The statute thus requires that the exemption authority operate according to necessity, not according to whim or caprice.

This statutory limit on the Commission's authority creates certain responsibilities for ICC. In exercising its waiver authority ICC must do more than shake a wand to make a law go away. It must supply a reasoned basis for that exercise of its statutory authority.[4]

This necessity component of ICC's waiver authority has not frequently arisen in the case law. In part this is because, in many of the ICC waiver authority cases, the necessity for the waiver is clear; the battle is fought over whether the waiver and transaction are in the public interest. *See, e.g., United States v. ICC, supra*, 396 U.S. 491, 90 S.Ct. 708, 24 L.Ed.2d 700. However, ample precedent supports the view that the Commission must supply some basis for a necessity determination before the exemption authority applies. In one line of cases the Supreme Court has assumed that ICC may waive state laws only if those state laws pose an obstacle to the transaction. *See Callaway v. Benton*, 336 U.S. 132, 140-141, 69 S.Ct. 435, 440-441, 93 L.Ed. 553 (1949) (waiver authority applies to "state laws interposing obstacles in the path of otherwise lawful plans of reorganization"); *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, 126, 68 S.Ct. 426, 430, 92 L.Ed. 580 (1948); *Texas v. United States*, 292 U.S. 522, 534-535, 54 S.Ct. 819, 825, 78 L.Ed. 1402 (1934).[5] Furthermore, the Supreme Court has stressed that the words of ICC's approval authority section must be carefully scrutinized to ensure that ICC does not exceed its statutory powers, *County of Marin v. United States*, 356 U.S. 412, 78 S.Ct. 880, 2 L.Ed.2d 879 (1958), and that ICC's approval authority, though broad, is ultimately reviewable as an exercise of reasoned decisionmaking. *See United States v. ICC, supra; Seaboard Air Line R. Co. v. United States*, 382 U.S. 154, 86 S.Ct.

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[4]This is not to say that the ICC must enumerate every legal obstacle that is waived in its approval. Such a requirement might undermine the approval authority's purpose of "facilitat[ing] merger and consolidation in the national transportation system. "*County of Marin v. United States*, 356 U.S. 412, 416, 78 S.Ct. 880, 883, 2 L.Ed.2d 879 (1958), because some legal obstacles to fruition of the transaction may not be entirely foreseeable at the time of approval. But ICC's decisionmaking process, either in the approval or in a later proceeding, must reveal evidence supporting a conclusion that waiver of particular legal obstacle is necessary to effectuate the transaction.

[5]*Schwabacher v. United States*, 334 U.S. 182, 68 S.Ct. 958, 92 L.Ed. 1305 (1948), also supports this analysis. As the Fifth Circuit has explained, "In *Schwabacher* * * * the insistence on further compensation by preferred stockholders of a merging company exceeded the compensation found just

277, 15 L.Ed.2d 223 (1965); *Minneapolis & St. Louis R. Co. v. United States*, 361 U.S. 173, 80 S.Ct. 229, 4 L.Ed.2d 223 (1959); *McLean Trucking Co. v. United States*, 321 U.S. 67, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

Other courts have also emphasized that there must be a basis in the record for the conclusion that the statutory waiver is necessary to the transaction. In *City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir.1977), cert. denied, 435 U.S. 950, 98 S.Ct. 1576, 55 L.Ed.2d 800 (1978), the Fifth Circuit provided an extensive analysis of this necessity problem. In vacating ICC's determination that it had waived certain contractual obligations the court stressed: "The ICC exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved * * * transaction. In its grant of approval authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency *unless those laws or contracts interfered with carrying out an approved merger.*" *Id.* at 414 (emphasis added). Similarly, in an earlier case the Fifth Circuit noted that ICC approval of a carrier's plans did not automatically remove the requirements of the Railway Labor Act and the Norris-LaGuardia Act. *Texas & New Orleans R. Co. v. Bhd of Railroad Trainmen*, 307 F.2d 151 (5th Cir.1962), *cert. denied*, 371 U.S. 952, 83 S.Ct. 508, 9 L.Ed.2d 500 (1963). *See also Interstate Investors, Inc. v. Transcontinental Bus System, Inc.*, 310 F.Supp. 1053, 1068 (S.D.N.Y.1970) (court must determine whether waiver of antitrust laws is "necessary" to completion of transaction).[6]

[9] With these principles in mind, the current dispute comes clearly into focus. ICC claims that the Railway Labor Act was a "law" appropriately waived in the exercise of its exclusive authority. ICC's analysis of the necessity for waiving the Railway Labor Act, however, is virtually non-existent, both in the 1982 decision and in the 1983 decisions. In the 1982 decision ICC never offered a word about waiving

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and reasonable in the ICC's approved plan of merger. In each of these [Supreme Court] cases the voided state-related provision impinged upon the effectuation of the transaction. * * * In *all* of the cases approving the ICC's nullifications of state law, *the laws stood in the way of the approved transaction.*" *City of Palestine, Texas v. United States*, 559 F.2d 408, 414-415 (5th Cir.1977) (emphasis added), *cert. denied*, 435 U.S. 950, 98 S.Ct. 1576, 55L.Ed.2d 800 (1978).

[6]ICC relies on *Bhd of Locomotive Engineers v. Chicago & Northwestern*

the Railway Labor Act with respect to the crew assignment in the trackage rights, much less the necessity for doing so. As noted, it merely approved the trackage applications and specified that the labor protection conditions applied in full. In the 1983 decisions ICC continued to give no necessity justification for the waiver of the Railway Labor Act. It claimed that "[t]he terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints." ICC Decision of October 25, 1983, JA 163. In its proceedings, then, the Commission did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act.[7]

ICC's complete failure to justify the necessity for waiving the Railway Labor Act respecting crew selection is especially conspicuous in light of evidence suggesting that the issue would *not* interfere with the trackage rights. First, the Commission specifically left the question of trackage compensation open to later negotiation between

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R. Co., 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819, 84 S.Ct. 55, 11 L.Ed.2d 53 (1963), to support its position. In that case the Eighth Circuit affirmed an ICC order that the Railway Labor Act would not apply. The government claims that *C&NW* stands for the proposition that the immunity is automatic and requires no finding of necessity. However, *C&NW* fails to carry the day for several reasons. First, *C&NW* itself recognized that immunity attached only to obstacles that would frustrate fruition of the merger. *Id.* at 432. Second, *C&NW* distinguished, but did not disagree with, *Texas & New Orleans. R. Co. v. Bhd of Railroad Trainmen*, 307 F.2d 151 (5th Cir.1962), *cert. denied*, 371 U.S. 952, 83 S.Ct.508, 9 L.Ed.2d 500 (1963). 314 F.2d at 433. And third, *C&NW* was explicitly limited to its facts. *Id.* at 434. *C&NW* did say that no *statement* of necessity was required. *Id.* at 432. To the extent that *C&NW* may be read to say that ICC need supply no *basis* for the necessity determination, we find the interpretation ill-conceived and reject it.

[7]ICC points to its October decision statement that "[t]he approval confers self-executing immunity on all material terms of the agreement from all other law to the extent necessary to permit implementation of the agreement." ICC Decision of Oct. 25, 1983 at 15, JA 171. It then claims that this reference to "material terms" provides a sufficient basis for immunity because crew selection was a "material term" of the trackage rights transaction. However, merely stating in totally conclusory terms that something is a "material term" is inadequate to provide the basis for the conclusion

the railroads, 366 ICC at 589-590; it never suggested why the question of crew selection was somehow so much more necessary to fruition of the transaction that normal Railway Labor Act procedures could not apply to the issue of crew selection. Second, ICC noted that MKT might find it necessary to use more crews than it suggested in its application, 366 ICC at 569-570; again, the Commission never suggested why the question of crew selection was so much more necessary to fruition of the transaction. On both of these issues, then, the Commission expressed a willingness to leave subsidiary trackage issues to later determination. Finally, the Denver & Rio Grande operated for some months with existing Missouri Pacific crews, and there has been no suggestion that the trackage rights were somehow frustrated as a result.[8]

In short, ICC has given no justification for a view that waiver of the Railway Labor Act is necessary to effectuate the transactions at issue. Indeed, the evidence in the record strongly suggests the contrary conclusion. The Commission therefore exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection.

In view of this disposition, it is unnecessary to reach the second statutory issue—whether ICC may ever waive the labor protection condition section (§11347) through the exercise of the exemption authority (§11341(a)). That issue turns on whether Section 11347 is viewed as a "law" that may be appropriately waived, or as a specific qualification on the exemption authority itself. We note only that the Commission has completely failed to show any conflict between these two

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that waiver is necessary to fruition of the transaction, as §11341(a) requires. We do not, as the dissent suggests, "attempt[] to disregard" this statement. Dissent at 735. Rather, we search in vain for the articulated, rational explanation of this purported finding that elementary principles of reasoned decisionmaking clearly demand. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245, 9 L.Ed.2d 207 (1962).

[8]The dissent's vehement protestations about the "procompetitive purpose" of the trackage rights approval are wide of the mark. For the question is whether the issue of *crew selection* somehow goes to that "pro-competitive purpose." ICC has never given the faintest hint of a reasoned explanation why crew selection is so essential to that purpose that the otherwise applicable provisions of the Railway Labor Act must be waived. Indeed, as discussed above, the evidence in the record indicates otherwise.

sections of the Interstate Commerce Act, which we assume were meant to be read in concert rather than in conflict, and we need not comment on the unlikely event that the two sections may pose a genuine conflict in some later case.[9]

We thus vacate the 1983 orders and remand the case to the Commission. The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

So ordered.

MacKinnon, Senior Circuit Judge (dissenting):

This case involves the consolidation of the Union Pacific Railroad Company ("UP"), the Missouri Pacific Railroad Company ("Missouri Pacific"), and the Western Pacific Railroad Company ("WP"), thus forming one of the nation's largest railroads. In an October 20, 1982 decision, the ICC granted specified trackage rights, over two sections of the Missouri-Pacific lines, to two railroads that would be harmed by the consolidation, the Missouri-Kansas-Texas Railroad Company ("Katy") and the Denver and Rio Grande Western Railroad Company ("Rio Grande"). The Commission authorized these two railroads to use their own crews to operate their own trains while exercising such trackage rights. My colleagues rule that the Commission has failed to find that it was "necessary" to the approval of the trackage rights applications and the underlying Union Pacific-Missouri Pacific-Western Pacific consolidation to waive any applicable protective labor conditions. In my view, the majority has ignored

[9]The unions have argued that the Railway Labor Act and § 11347 rights are largely coextensive in this case, and we thus view the Railway Labor Act argument as dispositive. To the extent that there is a meaningful difference between the Railway Labor Act and § 11347 protections, the unions have not argued it, and we need not address the issue. In any event, we note that our decision vacates the ICC decisions in their entirety.

the clear import of the record and, in a decision that pays lip service to our prescribed standard of review, substituted its judgment for that of the ICC. I therefore respectfully dissent.

I.

The majority holds first that the claims of the petitioning unions are not barred for being untimely because the October 20, 1982 ICC decision was not final and thus did not make the issue of crew selection ripe for review. I cannot agree with the majority's analysis.

This case began on September 15, 1980, when the UP, the Missouri Pacific, and the WP filed jointly for approval to consolidate. After the application was made public, 45 Fed.Reg. 68484 (1980), various parties entered the fray either to support or oppose the application. On January 13, 1981, the Katy and the Rio Grande opposed the consolidation and filed separate applications seeking protective trackage rights and other compensatory rights they alleged were necessary in order both to ameliorate the anticompetitive harms of the proposed consolidations and to protect them from revenue losses necessary to continue essential services.

The Katy sought trackage rights to operate over Missouri Pacific's tracks between Kansas City, Kansas, and Omaha, Nebraska, a distance of approximately 200 miles. The proposed operating agreement, as submitted to the ICC for approval, specified the operating conditions for the joint trackage rights and specifically stated:

> MKT [Katy], *with its own employees*, and at its sole cost and expense, shall *operate its engines, cars and trains on and along Joint Track.*

Finance Doc. No. 30,000 (Sub-No. 25) 1, Exh. No. 2 at 5 (emphasis added). The Rio Grande was harmed by the merger both at the Utah and the Pueblo, Colorado gateways. It sought joint trackage rights to operate over Missouri Pacific's tracks between Pueblo, Colorado, and Kansas City, Missouri, a distance of 619 miles. Its trackage rights application submitted for ICC approval stated:

> Rio Grande *may, at its option, elect to employ its own crews* for the movement of its trains, locomotives and cars to points on or over the Joint Track.

Id. (Sub-No. 18), Rio Grande Proposed Agreement §6(c)(3) (emphasis added). Thus, both railroads *expressly* requested ICC authority to use their own crews while operating their own "trains, locomotives and cars" over joint trackage with the Missouri Pacific.

On February 20, 1981, the Katy and the Rio Grande filed verified statements with the ICC in support of their applications for joint trackage rights. These statements indicated further that if the trackage rights were granted, the railroads would use their own crews. Verified Statements of Adolf Nance and Harold Hacker, quoted in J.A. at 165. In ruling on the applications, the *implicit issue* for the ICC was the degree of anticompetitive harm to which the Katy and Rio Grande would be subjected and accordingly what amount of compensatory rights would be *necessary* to protect the liability of the applicant railroads and to guarantee that they would furnish the necessary competition to the merged railroads. The petitioning unions, the Brotherhood of Locomotive Engineers ("Engineers" or "union") and the United Transportation Union ("UTU" or "union"), participated in the ICC proceeding and submitted evidence in opposition to the joint trackage rights applications. Hearings proceeded for eleven months, ending in January, 1982. There is no indication, however, that petitioners ever contended that UP or Missouri Pacific employees had a right to participate in the crew selection decision.

On October 20, 1982, the ICC approved the consolidation of the UP, the Missouri Pacific, and the Western Pacific and made the consolidation subject to the usual labor protective conditions set forth in *New York Dock Ry. — Control — Brooklyn, Eastern Dist. Terminal*, 360 I.C.C. 60 (1979). As part of the consolidation, while disapproving other requested compensatory conditions, the ICC specifically approved the applications of the Katy and the Rio Grande for the trackage rights described above, subject to the labor protection conditions specified in *Norfolk & Western Ry. Co. — Trackage Rights — Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc. — Lease and Operate*, 360 I.C.C. 653, 665 (1980). *Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific R.R. Co. — Control — Missouri Pacific Corp. and Missouri Pacific R.R. Co.*, 366 I.C.C. 459, 654 (1982). Though these labor protections were held to be applicable in general, I think it is clear that they were to be inapplicable to the crew selection issue since the crew selection provisions constituted part of the trackage rights applica-

tions approved by the final order of the Commission. Moreover, unlike other trackage rights-related requests by the Katy and Rio Grande which the Commission denied, *see* Majority Opinion at 724-725, there was no express denial of the crew selection requests. Therefore, the labor unions were on notice that the ICC had authorized the Katy and the Rio Grande to use their own crews in the operation of their own trains in the exercise of their joint trackage rights.

It was not until April 4, 1983, approximately five and one-half months after the ICC's decision approving the consolidation, that the Engineers filed a petition with the ICC seeking clarification of the October 20, 1982 decision. The ICC denied the Engineer's petition on the procedural grounds that crew selection had been an issue in the consolidation proceedings, that petitioners introduced no new evidence or arguments setting forth any issue in need of clarification, and that the issues involved had been decided in the Commission's October 20, 1982 decision. Following this denial, the UTU joined the Engineers in moving for reconsideration of the denial of the motion for clarification.

Time deadlines for requesting review of agency decisions are *jurisdictional* and cannot be enlarged by a reviewing court. *National Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981); *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 388-389 (D.C. Cir. 1974). The Hobbs Act prescribes that judicial review must be sought within 60 days of a final order. 28 U.S.C. §2344 (1982). An action of the Commission is final on the date on which it is served, and exhaustion of further administrative remedies is not required. 49 U.S.C. §10327(i) (Supp. V 1981). The Commission's decision here was served on October 20, 1982. In this case, then, the statutory time period expired December 20, 1982. No judicial review was sought before that date.

We have also recognized that a party who had the opportunity to participate in the underlying proceedings is a party "aggrieved" under 28 U.S.C. §2344. *See Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983). Yet I find no indication in the record or briefs that the Engineers or the UTU ever objected to the proposed crew provisions on the grounds that labor protections would be violated by granting them. Whatever caused petitioners not to seek timely review, it was not any ambiguity in the ICC decision of October 20, 1982. Petition-

ers plainly slept on whatever rights that they contend they possessed.

Determined to reach the contentions raised by this petition, however, my colleagues accept the labor union's argument that the crew selection issue was not ripe for review when the ICC served its decision. Petitioners contend that the issue was not ripe because the ICC's general pronouncement that the *New York Dock* and *Norfolk* labor protection provisions would apply somehow nullified the *express* statements in the applications regarding crew selection. The unions claim that they petitioned for clarification of the October 1982 decision as soon as it became apparent that the railroads intended to use their own crews, *i.e.*, when the railroads began to file their trackage rights agreements with the ICC. Brief of BLE at 719.[1] This claim should not be accepted as extending the time to appeal. The railroads at that time were doing nothing more than exercising the rights clearly granted them by the October 20, 1982 decision. The unions had been on notice since the day the applications for trackage rights were filed on January 13, 1981, that the railroads intended to use their own crews to operate their own trains if their applications for trackage rights were approved. The ICC's October 1982 decision approved those applications and authorized the use of the applicant's own crews in the operation of their own trains.

Moreover, I find the majority's analysis particularly difficult to swallow in light of *Eagle-Pitcher Industries, Inc. v. EPA*, 759 F.2d 905 (D.C. Cir. 1985) (Opinion by Edwards, J.). In *Eagle-Pitcher* this court emphasized that "[a]s a general proposition . . . if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred." *Id.* at 914. "[P]etitioners who delay filing requests for review on their own assessment of when an issue is ripe for review do so at the risk of finding their claims time-barred." *Id.* at 909. "Consequently," this court concluded,

> except where events occur or information becomes available after the statutory review period expires that essentially creates a challenge *that did not previous-*

[1]This contention imposes on the credulity of the court. The unions, if they ever looked at the applications of the Katy or the Rio Grande, and with their interest and the competency of their lawyers they must be presumed to have done so, must have known perfectly well that if trackage rights were granted the applicants intended to use their own crews.

> *ly exist* [emphasis added], or where a petitioner's claim is, under our precedents, *indisputably* not ripe until the agency takes further action, we will be very reluctant, in order to save a later petitioner from the strictures of a timeliness requirement, to engage in a retrospective determination of whether we would have held the claim ripe had it been brought on time.

Id. at 914. Under the *Eagle-Pitcher* analysis, at best petitioners must be said to have entertained "some" doubt about the ripeness of their claims. At worst, later occurrences did not create a challenge "that did not previously exist," nor were petitioners' claims "*indisputably* not ripe."

By this appeal petitioners plainly attempt to convert a petition to reconsider the denial of a motion for clarification into a challenge of a final decision by the ICC that granted the Katy and the Rio Grande the *right* to crew their own trains over joint trackage with the Missouri Pacific. Because the motion to clarify was denied on procedural grounds, the proper inquiry is whether the Commission's decision on the motion to reconsider the denial of the motion to clarify is a decision *on the merits*. A decision on the merits of the motion for reconsideration could extend the time period for seeking appellate review. *Bowman v. Loperena*, 311 U.S. 262, 61 S.Ct. 201, 85 L.Ed. 177 (1940). The majority, however, never reaches this question.

I thus disagree with the conclusion that the October 20, 1982 decision was not ripe for review. I am also disturbed by the ostensible ease by which the panel finds jurisdiction. Apparently, this court is not "fastidious about the impropriety of reaching merits issues without first establishing jurisdiction." *Beattie v. United States*, 756 F.2d 91, 126 (D.C. Cir. 1984) (Scalia, J., dissenting, opinion filed Feb. 26, 1985). *Compare Eagle-Pitcher, supra*, at 911 ("[p]roffered excuses for late filing are carefully scrutinized"). In my view, the very substantial delay of petitioners should not be so rewarded. My only solace lies in the hope that the majority's retrospective ripeness analysis is motivated by the fact that the present proceedings were conducted without the benefit of *Eagle-Pitcher*.

II.

Even assuming a finding of jurisdiction in this case is correct,

the majority has clearly erred in its decision on the merits. It decides that because the ICC did not make an *express* finding that the waiver of any labor protections applicable to the crew selection provisions in the trackage rights applications was "necessary" to approval of the transaction, it exceeded its authority under the Interstate Commerce Act, 49 U.S.C. §11341(a) (Supp. IV 1981), in excepting those provisions from any labor protections.

Why the lack of an express "necessity" finding in and of itself requires the court to vacate the ICC's approval regarding crew selection on this record is puzzling. The whole basis for granting the trackage rights, which included the crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger. Presumably, the majority senses a conflict between the approved crew selection provision and the unions' asserted rights. The majority, however, if it knows, does not indicate what the parameters of the unions' claimed rights might be and similarly fails to state where, if anywhere, these rights and applicable labor protections intersect. For all the majority indicates, they may not conflict at all. Indeed, this was the conclusion reached by the ICC (J.A. 163-164). Obviously, if there is no conflict, there is no need to *vacate* the Commission's decision on crew selection. Yet, in the absence of any evidence supporting the unions' claims, and in the face of justifications for the ICC's decision, the majority, without further inquiry, leap frogs the Commission's findings and completely nullifies the *authority* of the ICC to provide for crew selection in trackage rights agreements imposed to ensure that consolidations are in the public interest. The majority's reasons for doing so are inexplicable.

The arguments of the Engineers and the UTU, and the majority decision itself, are based on the fundamental assertion by the unions that they enjoy by custom and by collectively-bargained agreements a right to crew all trains passing over the Missouri Pacific's tracks. This is tantamount to a declaration that the unions, in effect, have a proprietary interest in the tracks of their employer — an astonishing contention. Also implicit in the unions' assertion is the claim that the unionized employees of the consolidated railroads (the Missouri Pacific, UP, and WP) have colorable right to bargain *with the Katy and the Rio Grande* over who will crew the trains of the latter railroads. There is no basis in law or fact for such an absurd conclusion. It is basic contract law that one cannot be bound by agreements be-

tween third parties. Even assuming such rights might exist, the ICC found that "the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the crew selection process' of foreign railroads operatings under trackage rights (J.A. 168).

In my opinion the court errs partly because it confuses the issue in this case. It states that "[t]he dispute is not over whether the railroads could use their own crews; [the dispute] . . . is whether they could use their own crews subject to the requirements of the [statutory] labor protection condition." Maj. Op. at 722. The ICC's October 20, 1982 decision stated that the labor protections *would* apply to the transaction. As previously explained, the ICC saw no apparent conflict between the protective labor conditions and its decision to permit crew *selection* by the railroads who operate the trains. But in its 1983 decisions, in an effort to meet the unions' scattered arguments, the Commission ruled in the alternative that the crew selection process was exempt from any labor protection conditions that *might* apply. In my view the issue in this case, assuming that the applicable labor provisions in the Act conflict with the proposed ICC action, is merely whether the ICC had the authority to so exempt the crew selection process from applicable labor protection conditions, and if so, whether it properly exercised that authority. In all other respects, the statutory labor protections still apply.[2]

The Interstate Commerce Act in Section 11341(a) provides:

> The authority of the Interstate Commerce Commission under this subchapter is *exclusive*. . . . A carrier, corporation, or person participating in that transaction is exempt from the antitrust laws *and from all other law*, including State and municipal law, *as necessary to let that person carry out the transac-*

[2] *See* Brotherhood of Maintenance of Way Employees v. ICC, 698 F.2d 315, 317 n. 6 (7th Cir. 1983) ("The adoption of standard conditions, routinely imposed, often results in incorporation of superfluous provisions having no application to the particular case under consideration."). Because the majority did not reach the issue of whether the labor protections under 49 U.S.C. §11347 can be exempted through §11341(a)'s exemption power, I too express no view on that issue. However, it seems to me that in this case

> *tion*, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. . . .

49 U.S.C. §11341(a) (emphasis added). The authority granted the ICC under this statute is very broad. To the extent necessary to approve a transaction — the merger in this case — the ICC may exempt the carrier involved from "*all other law*." This is plain language, and there is nothing on which to base any contention that it does not mean exactly what it says, or that the Railway Labor Act, 45 U.S.C. §§151 *et seq.* (1982)[3] is not a "law" subject to the exemption authority under §11341(a).

In *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry. ("North Western")*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819, 84 S.Ct. 55, 11 L.Ed.2d 53 (1963), the court held that §5(11) of the Interstate Commerce Act (now §11341(a)) conferred exclusive and plenary jurisdiction upon the ICC to approve mergers and exempt the carrier from all other restraints of *federal law*, including the Railway Labor Act ("RLA"). *Id.* at 429, 431-432. In that pre-Staggers Act case, the court affirmed the order of the ICC that approved a stipulation by the carriers that overrode the RLA. The court rejected the union's claim, which is similar to that made here, that the ICC lacked jurisdiction because it failed to find *expressly* that the provisions of the Railway Labor Act were rendered inoperative. *Id.* at 432. Rather, the court agreed with the Commission's finding, as expressed in another proceeding, that "[t]he terms of this paragraph are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints." *Id.* (quoting *Chicago, St. Paul, Minneapolis & Omaha Ry. Lease*, 295 I.C.C. 696 (1958)).

In the present case the Commission similarly noted that the provisions of §11341(a) provide "*self-executing* immunity on all material

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where the trackage rights applications were approved specifically to offset the anticompetitive harms of the consolidation, the unions' rights under *N&W* Art. I §4 exist vis-a-vis the consolidating railroads and not against either the Katy or the Rio Grande.

[3] 45 U.S.C. §152, Seventh, for example, forbids generally a carrier's change in pay, rules, or working conditions *contrary to labor agreements*, without resort to negotiation.

terms of the agreement . . . to the extent necessary to . . . implement[ ] the agreement" (J.A. 171) (emphasis added). Granted, *North Western*, *supra*, involved a stipulation by the carriers which required arbitration in a manner similar to that provided by the RLA. The majority, however, refuses to recognize the clear breadth of the ICC's authority expressed in *North Western*. Rather, it attempts to distinguish the case by noting how *similar* it is to the present case, *see* Maj. Op. at 724 n. 6, a novel technique that substantially broadens the ability to reach the result desired by the majority.[4]

The apparent ease by which the majority arrives at its conclusion is attributable in large part to its mischaracterization of Supreme Court precedent. Through the majority's misreading of these cases, it has manufactured a wholly new and more difficult ICC waiver standard. The majority claims support from "one line of cases" that assertedly permits ICC waiver "only if those state laws pose an *obstacle* to the transaction." Maj. Op. at 723 (emphasis added). No such "line" exists.

The principal case the majority cites for its contention, *Callaway v. Benton*, 336 U.S. 132, 140-141, 69 S.Ct. 435, 440-441, 93 L.Ed. 553 (1949), set forth the majority's quote in *dicta*. *Callaway* involved a railroad reorganization under §77 of the Bankruptcy Act, 11 U.S.C. §205, and under the "narrow facts" there present (336 U.S. at 150,

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[4]*City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950, 98 S.Ct. 1576, 55 L.Ed.2d 800 (1978), relied on by the majority, does not support its position. In that case, the ICC was found to have exceeded its authority when it voided an agreement with the city of Palestine to maintain a certain number of employees there, which was "not *germane* to the success of the approved . . . transaction." *Id.* at 414 (emphasis added). In the present case, not only does the record support the fact that the crew selection provision was important to ameliorate the anticompetitive aspects of the proposed consolidation, the Commission itself found the provision "material" to and "related to the transportation effects" of the transaction (J.A. 170, 171). Similarly, *Texas & New Orleans R.R. v. Board of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952, 83 S.Ct. 508, 9 L.Ed.2d 500 (1963), is not relevant to this case. That case involved the union's power to strike under the Norris-La-Guardia Act, 29 U.S.C. §§101 *et seq.*, and the court in fact stated that "Section [5(11), now §11341(a),] relieves the carriers of the restraints and limitations of other *laws*, but it does not, on its face, relieve them from the actions of other parties, i.e., the union's economic threat of a strike." *Id.* at 156 (emphasis added).

69 S.Ct. at 445), raised the question whether a bankruptcy court could enjoin a state court suit leading to a determination of the requirements of state law with respect to the sale of the entire assets of the lessor railroad. In its limited two paragraph discussion of §5(11) of the Interstate Commerce Act (now §11341(a)), the Court expressly rejected any reliance on that section of the Act and, furthermore, distinguished the Bankruptcy Act from the Interstate Commerce Act. *Id.* at 139-140, 69 S.Ct. at 440 ("[T]hat Section [§5(11)] relates to voluntary mergers, not to the purchase of a leased line as part of a plan of reorganization.") ("That power [under §77] flows from a different source than the power over consolidations under the Interstate Commerce Act."). In its only comment relevant to this case, the Court merely reiterated that nothing in its opinion should be read to derogate its prior opinions upholding the ICC's power "to *override* state laws interposing obstacles in the path of otherwise lawful plans of reorganization." *Id.* at 140-141, 69 S.Ct. at 441 (emphasis added) (footnote omitted).

The remaining cases cited by the majority similarly fail to support the proposition for which they are cited. In *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, 68 S.Ct. 426, 92 L.Ed 580 (1948), a South Carolina statute forbade the operation of foreign railroads in that state. The ICC approved a transaction and exempted the railroad from the strictures of the state law. The South Carolina Supreme Court held that the ICC lacked power under §5 to relieve the carrier from the state law requirements. The Court reversed, explaining:

> . . . Furthermore, since that case [*Texas v. United States*, 292 U.S. 522, 54 S.Ct. 819, 78 L.Ed. 1402 (1934)] was decided Congress has given additional proof of its purpose to grant adequate power to the Commission to override state laws which may *interfere with* efficient and economical railroad operation. By §5(11) of the Interstate Commerce Act, as amended by the Transportation Act of 1940, 54 Stat. 908, 49 U.S.C. §5(11), Congress granted the Commission "exclusive and plenary" authority in refusing or approving railroad consolidations, mergers, acquisitions, etc. *The breadth of this grant of power can be understood only by reference to § 5(2)(b) which authorizes the Commission to condition its approval upon "such terms and conditions and such modifications as it*

> *shall find to be just and reasonable.*" All of this power can be exercised in accordance with what the Commission may find to be "consistent with the *public interest.*" The purchaser of railroad property with Commission approval is authorized by §5(11) "to own and operate any properties . . . acquired through said transaction without invoking any approval under State authority," and such an approved owner, according to that paragraph, is "relieved from the operation of *the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved* . . . and to hold, maintain, and *operate* any properties . . . acquired through such transaction."
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> This language very clearly reposes power in the Commission to exempt railroads under a §5 proceeding from state laws which bar them from operating in the state *or impose conditions upon such operation.*

Id. at 125-126, 68 S.Ct. at 430 (emphasis added). Thus, the Court did *not* adopt an "obstacle" standard; rather it articulated the standard as being the "*public interest*" goal of the statute.

The third case cited by the majority, *Texas v. United States*, 292 U.S. 522, 54 S.Ct. 819, 78 L.Ed. 1402 (1934), concerned the ICC's approval of a transaction that had exempted a railroad from the prescriptions of a Texas statute which required a railroad operating in the state to maintain offices there. The Commission had found that requiring the railroad in question to maintain such offices would entail "unnecessary" and "burdensome" expenditures and waived compliance therewith. *Id.* at 533, 54 S.Ct. at 825. In upholding the ICC the Supreme Court noted:

> Title II of the Emergency Railroad Transportation Act, 1933, in amending §5 of the Interstate Commerce Act, carries its own provision as to immunity from state requirements which would stand in the way of the execution of the policy of the Congress through the Commission's orders.
>
> . . . .

> . . . . The scope of the immunity must be measured by the purpose which Congress had in view and had constitutional power to accomplish. As that purpose involved the promotion of *economy* and *efficiency* in interstate transportation by the removal of the *burdens* of excessive expenditures, the removal of such burdens when imposed by state requirements was an essential part of the plan. . . .

Id. at 534, 54 S.Ct. at 825. The granting of full trackage rights here is also an essential part of the plan to permit the merger and to compensate — in the public interest — for some of its anticompetitive effects.

Finally, in what can charitably be attributed to oversight, the majority fails to mention in its line of precedent and relegates to a footnote *Schwabacher v. United States*, 334 U.S. 182, 68 S.Ct. 958, 92 L.Ed. 1305 (1948), which contradicts the majority's position by stating that the "*public interest*" is the controlling consideration.[5] In *Schwabacher*, the ICC approved, again under §5(11), the voluntary merger of three railroads. Intervening dissenting shareholders of one of the merging railroads alleged that the terms of the merger would deprive them of charter rights granted by their company's state of incorporation. The Commission, however, disclaimed jurisdiction to pass on the claims of the shareholders and stated that the railroads were free to settle such controversies "through negotiation and litigation in the courts." *Id.* at 188, 68 S.Ct. at 962. The Supreme Court reversed. It held that the Commission erred in renouncing its authority to determine finally the rights of the dissenting shareholders, and specifically held that

> . . . *no rights* alleged to have been granted to dissenting stockholders by state law provision concerning liquidation *survive* the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable.

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[5]*Compare* Callaway v. Benton, 336 U.S. 132, 141 n. 10, 69 S.Ct. 435, 441, n. 10, 93 L.Ed. 553 (1949) ("Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118, 68 S.Ct. 426, 92 L.Ed. 580; Schwabacher v. United States, 334 U.S. 182 [68 S.Ct. 958, 92 L.Ed. 1305]; Texas v. United States, 292 U.S. 522 [54 S.Ct. 819, 78 L.Ed. 1402].") (emphasis added), *with* maj. Op. at 723.

Id. at 201, 68 S.Ct. at 968 (emphasis added). The Court reasoned that it would be "inconsistent to allow state law to apply a liquidation basis . . . for continued public service." *Id.* at 200, 68 S.Ct. at 968. Regarding the waiver authority, the Court reaffirmed that "'Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.'" *Id.* at 193-194, 68 S.Ct. at 964 (quoting *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, 124-125, 68 S.Ct. 426, 430, 92 L.Ed. 580 (1948)). The Court noted that "[t]he tenor of all . . . [its prior decisions under the Transportation Act of 1920, 41 Stat. 456] was to confirm the power and duty of the Interstate Commerce Commission, *regardless of the state law*, to control rate and capital structures, physical make-up and relations between carriers, in the light of the *public interest* in an efficient national transportation system." *Id.* at 192, 68 S.Ct. at 963 (emphasis added). Similarly, "[t]he Transportation Act of 1940 [54 Stat. 908, 49 U.S.C. §5(11)] . . . authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of *public interest, justice and reasonableness*, in which case they should become effective *regardless of state authority*." *Id.* at 193, 68 S.Ct. at 964 (emphasis added) (footnote omitted).[6]

In sum, not only did the Supreme Court *not* adopt the rigorous "obstacle" standard which the majority today requires, the Court envisioned that the legislative purpose was to grant the Commission *greater* authority than the majority suggests to override state laws where needed to approve transactions "consistent with *the public interest*" and to ensure that they are "just and reasonable." *Schwabacher*, 334 U.S. at 194-195, 68 S.Ct. at 965.

The majority would admonish us that the ICC's exemption authority under section 11341(a) must operate "according to necessity, not according to whim or caprice" and that in exercising this

[6]The majority's citation to County of Marin v. United States, 356 U.S. 412, 78 S.Ct. 880, 2 L.Ed.2d 879 (1958) in this discussion is misleading. That case held only that the transaction involved was not within § 5(2)(a) because one party in the acquisition was not a "carrier." The case had nothing to do with the scope of the Commission to approve transactions that *are* within the Commission's jurisdiction or with its waiver authority.

authority. "ICC must do more than shake a wand to make a law go away." Maj. Op. at 723. However, in this case it is not the ICC but the majority of the panel which relies on occult powers. For it is the majority who has made the ICC's Section 11341(a) exemption authority completely disappear and who has used its opinion to obscure the basis for the ICC's decision to exempt the crew selection process from any protective labor conditions.

There is no dispute here that the approval of the Katy and Rio Grande trackage rights was "necessary" to the approval of the UP-Missouri Pacific-Western Pacific consolidation. The ICC specifically found that the trackage rights were needed to offset the anticompetitive harms created by the consolidation. 366 I.C.C. 459, 566-579. This court has affirmed this aspect of the ICC's decision. *Southern Pacific Transportation v. ICC*, 736 F.2d 708 (D.C. Cir. 1984) (per curiam), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1172, 84 L.Ed.2d 322 (1985). But the ICC did not approve the trackage rights in the abstract; rather, it approved, pursuant to this "necessity" finding, the trackage rights as applied for by the Katy and the Rio Grande.

The ICC cannot bootstrap any exemption to its approval of transactions without justification. But this is far from such a case, since the necessity for the waiver is clear. The whole point of granting the trackage rights applications was to reduce the anticompetitive effects of the consolidation (J.A. 169). Under the ICC's decision the Katy and the Rio Grande will be handling traffic for their own accounts, not for the consolidated UP-Missouri Pacific-Western Pacific *(Id.)*. Thus, the trackage rights operations were meant to be conducted *in competition with* the merged UP-Missouri Pacific-Western Pacific operations, *Id.*, and to offset to some extent the monopolistic effects of that enormous consolidation.[7] The majority opinion gives short shrift to these essential reasons for the ICC's decision. To be sure, the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*. It is no surprise the Commission did not feel compelled to spell out specifically such a proposition.

Moreover, the majority's self-styled definition of "trackage rights," upon which the opinion depends, reduces that term to nothing more than a railroad's right only to have its traffic run over another's tracks.

See Maj. Op. at 718 n. 2. The majority *assumes*, with no justification whatsoever, that this cannot include a railroad's right to use its own crews in operating its own trains. This bespeaks an ignorance of what trackage rights might involve and ignores the crew selection provisions that are an integral part of the applications in this case. The majority, in fact, has pulled its definition out of its magic hat. Indeed, even UTU counsel at oral argument conceded that whether a railroad's "trackage rights" include a railroad's right to use its own crews "is really a very generic term subject to subsequent specific negotiations." The sole evidence of the meaning of the trackage rights that are here involved is found in the trackage rights applications and the decisions granting them.[8] Those applications stated in express terms that the Katy and Rio Grande would exercise their trackage rights by operating their own trains with their own employees and crews. But the majority *decides* in the teeth of the specific crew provisions themselves that trackage rights in this case do not include a railroad's right to use its own crews, even though such method of operating its trains was specifically applied for and authorized by the ICC.

That the ICC specifically left open for later negotiation between the railroads such terms as trackage compensation is no reason to infer that crew selection, which was specifically covered in the trackage rights applications, was not decided. Approval of crew selection had

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[7]For example, the ICC found that the UP-Missouri Pacific-WP consolidation itself, within the areas where the merged lines overlap, will reduce Missouri Pacific traffic on the Pueblo-Kansas City line by 18.7% in the years following the consummation of the merger. Granting the Rio Grande trackage rights will, as the ICC found, contribute substantially to the economic viability of the Pueblo-Kansas City line. 366 I.C.C. at 572. Moreover, the ICC found that granting the Rio Grande "independent access" to Kansas City through trackage rights would enable it to provide new competitive routes to compensate for the loss of traffic at the Utah gateway which the Rio Grande previously derived from its relations with the WP. *Id.* at 576. Thus, the ICC found a substantial public benefit realized by enhancing the stimulating competition in the central corridor. *Id.* Both the merged lines and the Rio Grande would benefit.

[8]Other cases have attempted to define "trackage rights." *See, e.g.*, Chicago, Rock Island & Pacific R.R. v. Chicago, Burlington & Quincy R.R., 437 F.2d 6, 10 (7th Cir.) ("Trackage rights" are continuing or permanent easements or licenses granted by one railroad to another railroad), *cert. denied*, 402 U.S. 996, 91 S.Ct. 2172, 29 L.Ed.2d 161 (1971).

been expressly requested in the railroad's application for trackage rights, and both applications had been approved. The ICC similarly considered it a "material term" of the trackage rights transaction (J.A. 171), a finding that the majority attempts to disregard. Whether a railroad uses its own crews to operate *its own trains* was not the type of "subsidiary" trackage issue the ICC left open for later negotiation. *See* Maj. Op. at 724-725. To require that the Katy and the Rio Grande submit the issue of crew selection to arbitration could frustrate the trackage rights agreement itself and could destroy one of the essential conditions upon which the ICC approved the merger.

Finally, petitioners cannot now complain that the Commission failed to make a specific finding about the necessity for the crew selection process when no party, *including the petitioners*, contended during the hearings that granting the pending applications of the Katy and Rio Grande would improperly override existing collective bargaining agreements (J.A. 164, 167).

The majority has thus found itself with the rather absurd result that the Katy and the Rio Grande may not, in the exercise of their trackage rights, use their *own* employees to operate their *own* trains carrying their *own* traffic, for their *own* account, until the railroads have engaged in collective bargaining under the Railway Labor Act with their employees and possibly those of competitor railroads. As one trial judge has already noted in a related proceeding involving many of the same issues as we have here, "Congress did not intend that affected employees have such power to block consolidations which are in the public interest." *Missouri Pacific R.R. v. United Transportation Union*, 580 F. Supp. 1490, 1505 (E.D. Mo. 1984), *appeal pending* (8th Cir.).

In my view, the majority has vacated the ICC's crew provision based on assumptions not supported by the record. It has closed its eyes to the specific pro-competitive purpose that the ICC found would be served by the approval of the trackage rights applications in this case. In doing so, the panel has usurped the statutory authority of the ICC and has substituted its judgment for that of the ICC. I cannot join in such a curtailment of the authority that Congress has granted to the ICC under 49 U.S.C. §11341(a), and which the ICC exercised to ensure that the consolidation it approved would serve the "*public interest*." 366 I.C.C. at 572, 644. Since this is one of the largest mergers

in the history of American railroads, the majority's failure to correctly apply the law here could lead to tremendous nationwide harm. Accordingly, I dissent.

APPENDIX B

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 30,000 (Sub-No. 18)

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY—TRACKAGE RIGHTS—MISSOURI PACIFIC RAILROAD COMPANY—BETWEEN PUEBLO, CO AND KANSAS CITY, MO

Finance Docket No. 30,000 (Sub-No. 25)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY —TRACKAGE RIGHTS-MISSOURI PACIFIC RAILROAD COMPANY—BETWEEN KANSAS CITY, KS AND OMAHA, NE

PETITION FOR CLARIFICATION

Decided: May 12, 1983

By petition filed April 4, 1983, the Brotherhood of Locomotive Engineers (BLE) seeks clarification of our decision[1] approving the consolidation of the Union Pacific Railroad Company (UP) and Missouri Pacific Railroad Company (MP) (collectively referred to herein as applicants). The Missouri-Kansas-Texas Railroad Company (MKT), the Denver and Rio Grande Western Railroad Company (DRGW), and applicants have filed replies.

BACKGROUND

Pursuant to 49 U.S.C. §11343-4, applicants sought authority to consolidate their railroad systems under the common control of Union Pacific Corporation and Pacific Rail System, Inc., a new railroad holding company.[2] The consolidation decision, served October 20,

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[1] *Union Pacific—Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982), embracing Finance Docket No. 30,000 (Sub-No. 18), *Denver and Rio Grande Western Railroad Company—Trackage Rights—Missouri Pacific Railroad Company- Between Pueblo, CO and Kansas City, MO*, and Finance Docket No. 30,000 (Sub-No. 25), *Missouri-Kansas-Texas Railroad Company—Trackage Rights—Missouri Pacific Railroad Company—Between Kansas City, KS and Omaha, NE.*

[2] In another application, handled on a consolidated basis, UP sought authority to acquire control of Western Pacific Railroad Company.

1982, which BLE seeks to have clarified, approved the proposed transaction[3] subject to various conditions. These conditions included approval of DRGW and MKT responsive trackage rights applications in the embraced Sub-No. 18 and Sub-No. 25 proceedings, respectively. The approved trackage rights authorize DRGW to operate over MP's line between Pueblo, CO, and Kansas City, MO, and authorize MKT to operate over MP's line between Kansas City, KS and Omaha, NE. Approval of the consolidation was conditioned upon the grant of these trackage rights in order to protect the public interest from potential anticompetitive harms.

POSITIONS OF THE PARTIES

BLE: BLE seeks to have the consolidation decision clarified with respect to whether MKT and DRGW may use their own operating crews in performing trackage rights operations over MP lines. It asserts that this Commission has no jurisdiction over crew assignment matters and that our decision should not be construed as authorizing MKT or DRGW to use their own crews in the performance of the approved operations. It indicates that these matters are subject to settlement in accordance with the Railway Labor Act and are not within the scope of our decision approving the responsive trackage rights applications.

MKT: MKT asserts that the consolidation decision clearly and correctly authorizes it to conduct trackage rights operations using its own crews. MKT's operating plan submitted as part of its trackage rights application specified that the operations would be conducted using MKT crews. The application was approved without restrictions on the proposed operating plan. MKT notes that we have very broad conditioning powers under 49 U.S.C. §11343 in consolidation proceedings and that our jurisdiction over consolidations, and the terms and conditions thereof, is plenary under 49 U.S.C. §11341.

DRGW: DRGW contends that our later decisions in these proceedings, served November 24, 1982, and January 18, 1983, regarding DRGW trackage rights operations clearly and unambiguously state that DRGW has been authorized to conduct operations over MP lines using its own crews. Therefore, DRGW considers this issue to be moot with respect to its operations.

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[3] The consolidation was subsequently consummated on December 22, 1982.

Applicants: Applicants argue that the consolidation clearly authorized MKT and DRGW to operate using their own crews. The trackage rights applications specified that the trackage rights tenants would use their own crews and no party opposed that aspect of the plans during the course of these proceedings. Approval of the applications, including the operating plans, they state, is within our jurisdiction.

DISCUSSION AND CONCLUSIONS

The consolidation decision does not require clarification. We approved the responsive trackage rights applications of DRGW and MKT in Sub-No. 18 and Sub-No. 25 subject only to applicable employee protective conditions and the requirement that the parties negotiate compensation for use of the MP lines (or request us to set compensation in the event of an impasse). Inasmuch as DRGW and MKT proposed in their applications that the operation would be performed with their own crews, our approval of the applications authorizes such operations. Our decisions of November 24, 1982, and January 18, 1983, unambiguously specified that trackage rights tenants may perform operations using their own crews.[4]

BLE has presented no arguments or evidence setting forth any issue in need of clarification. Rather, BLE is attempting to reargue an issue that has already been decided. Its petition does not present any facts, however, that warrant reopening these proceedings for reconsideration. We have broad authority to impose conditions on consolidations and our jurisdiction is plenary. Therefore, we properly authorized performance of trackage rights tenants using their own crews. The petition will be denied.

[4]This includes current employees of MKT and DRGW as well as any new employee they may hire of their own free will (including MP employees).

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The petition of BLE for clarification is denied.

2. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

(SEAL)

Agatha L. Mergenovich
Secretary

APPENDIX C

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 30,000 (Sub-No. 18)

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY-TRACKAGE RIGHTS-MISSOURI PACIFIC RAILROAD COMPANY-BETWEEN PUEBLO, CO AND KANSAS CITY, MO

Finance Docket No. 30,000 (Sub-No. 25)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY-TRACKAGE RIGHTS-MISSOURI PACIFIC RAILROAD COMPANY BETWEEN KANSAS CITY, KS AND OMAHA, NE

PETITION FOR CLARIFICATION

Decided: October 19, 1983

By petition filed May 31, 1983, the Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU) seek reconsideration of our decision served May 18, 1983, denying BLE's petition for clarification in these proceedings. Replies have been filed by Missouri-Kansas-Texas Railroad Company (MKT), Denver and Rio Grande Western Railroad Company (DRGW), and jointly by Union Pacific Railroad Company (UP) and Missouri Pacific Railraod Company (MP). UTU has petitioned for leave to file a reply to the replies.

PROCEDURAL MATTER

Our Rules of Practice do not permit a reply to a reply, 49 C.F.R. §1104.13(c). UTU, however, contends that its tendered reply is necessary for a clear presentation of the issues. As the reply does not broaden the scope of UTU's petition, we will accept the reply for filing so that we may fully address the issues.

BACKGROUND

By decision served October 20, 1982, the Commission approved the consolidation of UP and MP under the common control of Union Pacific Corporation and Pacific Rail System, Inc. *Union Pacific-Control-Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982).

Several railroads, including DRGW and MKT, opposed the consolidation and filed responsive applications for the imposition of trackage rights conditions. BLE, UTU, and various other railway labor organizations opposed the consolidation and actively participated in the consolidation and responsive trackage rights applications proceedings.

As conditions to approval of the consolidation we approved DRGW's application for trackage rights over MP's line between Pueblo, CO and Kansas City, MO, and MKT's applications for trackage rights over UP and MP lines extending between Kansas City, KS, Topeka, KS, Omaha, NE, and Lincoln, NE. Pursuant to 49 U.S.C. §11343-4, we approved the proposed trackage rights agreements submitted by DRGW and MKT in their responsive applications, subject to determination of fair compensation for use of the trackage rights and further subject to our usual employee protective conditions.[1] DRGW's proposed agreement specified that DRGW could, at its option, perform trackage rights operations using its own crews. MKT, pursuant to its proposed agreement, would use its own crews in performing its operations.

After consummation of the consolidation, DRGW and MKT began performing the approved trackage rights operations. A dispute then arose between the involved railroad and BLE over whether the trackage rights tenants could perform operations over MP's lines using their own crews without the consent of the unions representing MP's employees. BLE's petition for clarification sought a decision stating that his Commission has no jurisdiction over these crew assignment disputes and that the consolidation decision and approval of trackage rights did not authorize DRGW and MKT to operate over MP lines using their own crews. BLE and UTU now seeks reconsideration of our decision denying that request for relief.

In its petition for reconsideration, BLE contends that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act (RLA) 45 U.S.C. §151, *et seq.* BLE further asserts that trackage rights operations by DRGW and MKT using their own crews constitute a

[1] *Norfolk and Western Ry. Co.—Trackage Rights-BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc. -Lease and Operate*, 360 I.C.C. 653, 664, (1980) (NW-BN conditions).

unilateral change in working conditions by MP in violation of the labor protective conditions imposed on the consolidation.[2]

UTU argues that the Commission's plenary jurisdiction over railroad consolidations does not authorize us to immunize a transaction from the requirements of the RLA or to approve unilateral changes of collective bargaining agreements. UTU states in the alternative that if the Commission has jurisdiction it failed to make necessary findings supporting overriding the RLA or showing how the policies of the RLA were accommodated with those of the Interstate Commerce Act.

In their replies, DRGW, MKT, and UP-MP assert that the arguments of BLE and UTU are legally incorrect, that petitioners have failed to satisfy the procedural requirements for reopening a proceeding, and that the allegations of violations of the RLA and collective bargaining agreements were not raised during the course of the proceedings on the consolidation and the responsive trackage rights application.

UTU, in its response to the railroads' pleadings, make further arguments regarding purported violations of the RLA, collective bargaining agreements, and the *New York Dock* conditions. It asserts that the trackage rights operations involve work which, by custom, is to be performed by MP employees. Thus, operations using the tenant's crews are unauthorized transfers of the work in violation of the RLA. It further states that only the Federal Courts have jurisdiction to determine whether an agreement violates the RLA. UTU also argues that we did not, and could not, determine that MP employees have no right to participate in the trackage rights crew selection process. It contends that such a determination would deprive MP employees of property rights without due process and would violate the requirements of 49 U.S.C. 11347 and of the *NW-BN* and *New York Dock* conditions.

DISCUSSION AND CONCLUSIONS

The various arguments of BLE and UTU are all based essentially on the assertion that the proposed trackage rights operations which

[2]The consolidation is subject to the usual labor protective conditions as set forth in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock* conditions).

we have approved involve UP-MP unilaterally changing the working conditions of their employees by transferring work which, by custom and under collective bargaining agreements, is to be performed by UP-MP employees. This purported change, petitioners argue, violates the RLA and the *New York Dock* and *NW-BN* conditions. Petitioners contend that UP-MP employees, through their bargaining agents, have the right to participate in the trackage rights crew selection process and have the right to have any related disputes resolved pursuant to the RLA and the applicable labor protective conditions. We find these arguments to be unpersuasive and unsupported by the record in these proceedings.

Jurisdiction. Although we conclude that the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements, we will address UTU's argument that we lack jurisdiction under 49 U.S.C. 11341 to exempt a transaction from the requirements of the RLA.

The Commission's jurisdiction over railroad consolidations and trackage rights transactions, within the scope of 49 U.S.C. 11343, is exclusive. Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA. *See Brotherhood of Loc. Eng. v. Chicago & North Western Ry. Co.*, 314 F.2d 424, 432, (8th Cir. 1963), *cert. denied* 375 U.S. 819 (1963).

Contrary to UTU's arguments, the 4-R Act[3] did not limit our authority to exempt a transaction from the RLA. Rather, the 4-R Act specified standards for the minimum level of employee protection to be imposed as conditions to the approval of certain transactions. Those standards, however, do not require preserving rights under the RLA. Affected carrier employees have rights to the extent specified in the protective conditions imposed pursuant to 49 U.S.C. 11347.

As UTU notes, standard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working condi-

[3]Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976).

tions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

Employees adversely affected by the transaction may receive benefits under the protective conditions and under pre-existing agreements to the extent those benefits are not pyramided. If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent. The discussion of this point in *Brotherhood of Loc. Eng., supra*, at 430-1, is persuasive and we conclude that this reasoning is unaffected by the enactment of the 4-R Act.

Supporting Findings. Petitioners argue that even if the Commission has jurisdiction to exempt the transactions from the RLA, we failed to do so in this proceeding. Further, they argue that we have not attempted to reconcile the decision with the policies of the RLA nor made any findings supporting an exemption from the RLA.

The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints. *See Brotherhood of Loc. Eng., supra, citing Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, at 432 (1958).

In evaluating a transaction under the criteria of 49 U.S.C. 11344, we must consider the policies of statutes other than the Interstate Commerce Act to the extent that those policies are relevant to the determination of whether a proposal is consistent with the public interest. For example, the public interest evaluation must include consideration of the policies of the antitrust laws. *See McLean Trucking Co. v. United States*, 321 U.S. 67, 87 (1944).

While the RLA, like the antitrust laws, embodies certain public policy considerations, the Interstate Commerce Act also specifies that the interests of affected employees must be considered. In these proceedings we gave full consideration to the impact of the consoli-

dation on railroad employees in accordance with our established policies. 366 I.C.C. 618-22.

The record in these proceedings is devoid of any suggestion by BLE, UTU, or any other party that the approval of the responsive trackage rights applications, subject to the usual labor protective conditions, would be in any way inconsistent with the policies of the RLA. In these circumstances, we can find no merit in UTU's argument that we improperly failed to reconcile the policies of the RLA with our decision.

Labor Conditions. Petitioners contend that operations by the trackage rights tenants, using their own crews, over UP-MP lines would constitute a unilateral change in working conditions for UP-MP employees in violation of the *NW-BN* and *New York Dock* conditions. They further contend that these crew assignment disputes are labor issues in which the Commission should not be involved. As previously discussed, the standard labor conditions do not freeze working conditons which must be altered to implement an approved transaction. The record in these proceedings strongly supports the conclusion that the approved trackage rights operations are not inconsistent with the terms of any collective bargaining agreements or of the imposed labor conditions.

BLE, UTU, and various other railway labor organizations participated in these proceedings, and none made any argument or presented any evidence that the responsive trackage rights proposals would violate any applicable labor agreements. Rather, the record supports the conclusion that the trackage rights operations, using the tenants' crews, could be implemented as approved without raising any dispute over crew assignments between the employees of different railroads.

The responsive trackage rights applications in these proceedings were filed in January 1981, and in accordance with regulations, included proposed trackage rights agreements which specified the operating conditions for the trackage rights. The agreement in MKT's application specified: "MKT, with its own employees, and its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." Proposed agreement Section 5, MKT trackage rights appliction, Finance Docket No. 30,000 (Sub-No. 25) (MKT-25). DRGW's application provided: "Rio Grande may, at its option, elect

to employ its own crews for the movement of its trains, locomotives and cars to points on or over the Joint Track. . . ." Proposed agreement Section 6(c)(3), DRGW trackage rights application, Finance Docket No. 30,000 (Sub-No. 18) (DRGW-8). Therefore, in January 1981, over a month before the commencement of hearings, all parties had notice that the responsive trackage rights applicants sought authority to perform operations using their own crews.

On February 20, 1981, DRGW and MKT filed their verified statements in support of their responsive applications. These statements further make clear the position of those carriers that, if their applications were approved, they would have the right to conduct trackage rights operations using their own crews. For example, DRGW's evidence stated: "If our trackage rights applications are granted, both over WP[4] and MP, we anticipate that a fewer number of employees will be displaced, or a reduction of 176 jobs as opposed to 350 jobs if these applications are not granted." Verified Statement of A.E. Nance, at 15. MKT's evidence stated: "The projected position impacts shown on Exhibit 4 [to the trackage rights applications] reflect our determination of the number of positions that would be created, eliminated or transferred, or the other affects of such actions due to the acquisition of trackage rights. Our determinations were based primarily on the essential provisions of the applicable labor agreements and consultation with other carrier officers." Verified Statement of Harold M. Hacker, at 2. These verified statements clearly demonstrate the intent of MKT and DRGW to operate using their own crews. The assessments of labor impacts make no mention of any possibility of UP-MP employees having any right to perform the proposed operations.

During the course of hearings in these proceedings, DRGW and MKT witnesses Nance and Hacker were cross-examined on the testimony in their verified statements. No labor party cross-examined Mr. Hacker. *See* Transcript, Finance Docket No. 30,000, Bifurcated Hearing, June 23, 1981, at 3398-3417. Thus, Mr. Hacker's testimony regarding labor impact on MKT employees as a result of approval of the proposed trackage rights operations stands in the record without qualification.

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[4]The application for trackage rights over the Western Pacific Railroad Company was subsequently withdrawn.

Mr. Nance was cross-examined by various parties, including UTU. Under cross-examination by counsel for UP-MP, Mr. Nance testified that DRGW was willing to negotiate with UP-MP regarding whose crews would perform operations. Transcript, Finance Docket No. 30,000, June 23, 1981, at 8432-3. He testified that "as these trackage rights are granted to us we are willing to sit down and work out any kind of arrangement you [UP-MP] want." at 8433, *also see* at 8449-50. Mr. Nance's testimony clearly states that the decision whether to use UP-MP or DRGW crews would be a matter solely within the discretion of the management of the railroads. At no point does he indicate that UP-MP employees would have any right to participate in the decision-making process.

Following cross-examination by applicants, the labor parties had the opportunity to cross-examine Mr. Nance. BLF did not question him. Counsel for UTU's cross-examination dealt exclusively with Mr. Nance's projection of the impact of the primary transactions on DRGW's employees. No questions were asked regarding DRGW's assessment of the labor impacts of its sought responsive trackage rights. Transcript at 8555-8.

BLE and UTU submitted evidence and presented witnesses in opposition to the responsive trackage rights applications. Nowhere in these evidentiary presentations did the labor parties indicate that UP-MP employees would have a right to participate in the selection of which railroad's crews would perform trackage rights operations.

On July 3, 1981, BLE submitted the verified statement of Edmund G. Becker in opposition to trackage rights over UP lines. Prepared Statement BLE-1, entered into evidence as BLE-H (VS)-2. Mr. Becker noted that the trackage rights applicants intended to perform operations using their own crews. He testified that granting the responsive applications "would have an adverse effect on the engineers currently handling the traffic received from and delivered to the Missouri-Kansas-Texas Railroad at Kansas City [and] . . . it would be safe to say that no less than two hundred-sixty (260) engineers would be affected due to the ripple effect. . . ." BLE-H(VS) 2, at 4. The verified statement does not suggest that UP engineers would have any protection from these adverse consequences under any collective bargaining agreements or the RLA. Further, on cross-examination, Mr. Becker did not indicate that UP engineers would have any right to

participate in trackage rights work force selection. Rather, he testified that UP engineers would be adversely affected by approval of the responsive applications. Transcript, at 12, 974-81, September 16, 1981.

On August 31, 1981, the parties identified as Various Labor Organizations, including UTU, submitted verified statements (VLO-H(VS)-2). Representatives of UTU provided verified statements included in VLO-H(VS)-2. None of those statements, however, contain testimony supporting the assertion that UP-MP employees would have any right to participate in the trackage rights crew selection process.

Finally, in their post-hearing briefs neither UTU nor BLE made any arguments or cite any evidence in support of the positions they now advocate. The brief for Various Labor Organizations, in its statement of facts, cites Mr. Nance's testimony regarding labor impact of the consolidation, with and without approval of DRGW's trackage rights application. Thus, the brief filed on behalf of UTU accepts labor impact evidence which assumes that trackage rights operations would be performed by the tenant using its own crews. BLE's brief does not discuss the labor impacts of the responsive trackage rights. Rather, it merely made reference to BLE-H (VS)-2 on that point. Thus, the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the trackage rights crew selection process.

Further, petitioners' argument regarding the alleged unilateral change of working conditions mischaracterizes the nature of the trackage rights operations. BLE and UTU have cited decisions such as *St. Louis Southwestern Ry. Co.* v. *Broth. of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1981) for the proposition that railroads cannot transfer or contract out work which, under collective bargaining agreements and by custom, is to be done by their own employees. These decisions are not relevant with respect to the trackage rights crew assignments in issue here. We approved the MKT and DRGW trackage rights applications to ameliorate certain anticompetive impacts of the UP-MP consolidation. Those trackage rights operations will be conducted in competition with UP-MP operations. MKT and DRGW will be handling traffic for their own accounts not for UP-MP. UP-MP

has not transferred or contracted out any work by agreeing to the trackage rights as a condition to the consolidation.

BLE and UTU both contend that our decision denying BLE's petition for clarification is inconsistent with our general policy of not injecting the Commission into labor disputes. In support, petitioners cite Finance Docket No. 28046, *Illinois Central Gulf R. Co.-Trackage Rights-Over Chicago & I.M. RY. Co.* (not printed), served February 22, 1977 and Finance Docket No. 30138, *Cairo Terminal Railroad Co.-Trackage Rights Exemption-Illinois C.G. R. Co.* (not printed), served May 17, 1983.

In *Illinois Central Gulf*, the Commission approved a trackage rights agreement which included a provision that the trackage rights tenant would perform operations using its own crews. UTU filed a petition for reconsideration asserting that the Commission had no authority to impose a crew assignment condition and requesting that the condition be removed. The Commission, Division 3, dismissed the petition for reconsideration finding that the crew assignment provision of the agreement was not a condition imposed by the Commission pursuant to the section of the Interstate Commerce Act now codified as 49 U.S.C. 11347. Rather, the provision was a negotiated agreement between the railroads. The provision was approved (and thus immunized it from all other laws) because it would have no adverse transportation effects. The Division noted that the Review Board, in approving the trackage rights, declined jurisdication over all *other* subject matters and the Division concluded that the Commission has no jurisdiction to impose or to remove crew assignment provisions.

UTU and BLE ask us for the same relief the Commission denied in *Illinois Central Gulf*. The Commission has the power to approve (and to immunize from other laws) crew assignment provisions in trackage rights agreements. These provisions are not labor conditions and cannot be removed or modified in the manner applicable to labor conditions.

In *Cairo Terminal*, the involved railroads sought an exemption for a proposed trackage rights agreement. The agreement contained a provision regarding which carrier's employees would perform the trackage rights operations. UTU protested the exemption request and requested that the Commission expressly disclaim jurisdiction over the crew assignment provision. UTU's argument was not considered

because the Commission's action in that proceeding was based on 49 U.S.C. 10505, not on 49 U.S.C. 11344 relating to approval of trackage rights agreements. The decision noted, however, that "Crew assignment provisions in trackage rights agreements are within this Commission's subject matter jurisdiction to the extent they relate to the transportation effects of the proposed transaction." Slip op., at 8.

Trackage rights agreements are considered under the criteria of 49 U.S.C. 11344 and if those criteria are met, the agreement is approved. The approval confers self-executing immunity on all material terms of the agreement from all other law to the extent necessary to permit implementation of the agreement. To the extent employees are adversely affected by the transaction they are entitled to benefits under the conditions imposed pursuant to 49 U.S.C. 11347.

Provisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and may be implemented without any other approval. Further, the agreement is exempted from any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision.

This action will not significantly affect either the quality of the human environment or energy consumption.

It is ordered:

1. The petitions of BLE and UTU for reconsideration are denied.

2. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

(SEAL)

Agatha L. Mergenovich
Secretary

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-2290

Brotherhood of Locomotive Engineers

v.

Interstate Commerce Commission and
United States of America
And Consolidated Case No. 83-2317

BEFORE: Wright and Mikva, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of the unopposed joint motion of respondents Interstate Commerce Commission and United States of America for further stay of mandate, it is

ORDERED, by the Court, that the motion is granted and the Clerk is directed to withhold issuance of the mandate through October 9, 1985.

Per Curiam
FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-2290

Brotherhood of Locomotive Engineers

v.

Interstate Commerce Commission and
United States of America
And Consolidated Case No. 83-2317

BEFORE: Wright and Mikva, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of the joint motion of respondents Interstate Commerce Commission and United States of America for further stay of mandate through November 8, 1985, it is

ORDERED, by the Court, that the motion is granted and the Clerk is directed to withhold issuance of the mandate through November 8, 1985.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Mikva would deny the motion.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-2290

Brotherhood of Locomotive Engineers
and United Transportation Union

v.

Interstate Commerce Commission and
United States of America
And Consolidated Case No. 83-2317

BEFORE: Wright and Mikva, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of the petitions for rehearing of the various parties, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

Senior Circuit Judge MacKinnon would grant the petitions for rehearing.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-2290

Brotherhood of Locomotive Engineers

v.

Interstate Commerce Commission and
United States of America
And Consolidated Case No. 83-2317

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of the various parties have been circulated to the full Court and a majority of the judges in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestions for rehearing *en banc* are denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Starr would grant the suggestions for rehearing *en banc*.

APPENDIX H

45 U.S.C. §156

§156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

APPENDIX I

49 U.S.C. §11341

§11341. Scope of authority

(a) The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

(b) A power granted under this subchapter to a carrier or corporation is in addition to and changes its power under its Corporate Charter and under State law. Action under this subchapter does not establish or provide for establishing a corporation under the laws of the United States.

APPENDIX J

49 U.S.C. §11343

§11343. Consolidation, merger, and acquisition of control

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control

49 U.S.C. §11343 (cont'd)

of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliate with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d) (1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e)(1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter related to a motor carrier of

49 U.S.C. §11343 (cont'd)

property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, consolidation, and acquisition of control provisions of this subchapter if the Commission finds that—

(A) the application of such provisions is not necessary to carry out the transportation policy of Section 10101 of this title; and

(B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter may take effect, each carrier intending to participate in such transaction shall file with the Commission a notice of its intention to participate in such transaction and shall give public notice of such intention. The Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission, on its own initiative or on complaint, may revoke an exemption granted under this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the person, class of persons, or transportation is necessary to carry out the transportation policy of Section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter are or will be adversely affected by such transaction or if employees of such carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects of such employees.

APPENDIX K

49 U.S.C. §11344

§11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to the in Section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in Section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

49 U.S.C. §11344 (cont'd)

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by

49 U.S.C. §11344 (cont'd)

the Commission, the Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 5(a)-(d) of the Department of Transportation Act (49 U.S.C. 1654 (a)-(d)), accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

APPENDIX L

49 U.S.C. §11347

§11347. Employee protective arrangements in transactions involving rail carriers

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms established under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).